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LAW REPORTS

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Supreme Court of Judicature.

CASES DETERMINED IN THE

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1916.—VOL. II.

LONDON:
Printed for the Council of Law Reporting
By BRADBURY, AGNEW, & CO. Ld., of 10, BOUVERIE STREET, E.C.,
And Published
By THE COUNCIL at 10, OLD SQUARE, LINCOLN'S INN, W.C.

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Page 181. In the case of *In re Muirhead, Muirhead* v. *Hill*, add *W. S. Eastwood* as counsel for other parties, and at end of case insert "Trinder, Capron & Co." instead of Capron & Co.

At *page* 442, *line* 3, of [1916] 2 Ch., *for* "8" *read* "2."

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows :—

In the First Series,
[1916] 1 Ch. [1916] 2 Ch.

In the Second Series,
[1916] 1 K. B. [1916] 2 K. B. [1916] P.

In the Third Series,
[1916] 1 A. C. [1916] 2 A. C.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

WELBY *v.* PARKER.

[1915 W. 1808.]

C. A.
1916
March 30.

Statute—Retrospective Operation—Suspension of Remedy—Interference with Rights—Mortgagee's Right of Foreclosure—Taking "any steps for exercising"—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 97), *s.* 1, *sub-s.* 4.

Sect. 1, sub-s. 4, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, provides that " it shall not be lawful for any mortgagee under a mortgage to which this Act applies, during the continuance of this Act, and so long as " certain conditions are fulfilled, "to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured."

A mortgagee, under a mortgage created in 1910, and to which the Act applied, before the Act came into operation issued a writ to enforce his security by foreclosure or sale, and applied by summons in chambers for an order nisi. It was admitted that all the conditions of s. 1, sub-s. 4, had been fulfilled by the mortgagor. The summons was adjourned to Eve J. after the Act had come into operation. He dismissed it on the ground that the Act was retrospective, and that by attending at the hearing of the summons the mortgagee was taking a step for exercising his right of foreclosure within the meaning of the section :—

Held, on appeal, that the Act did not take away any rights, but merely suspended a particular form of remedy. It related to a matter of procedure and therefore might operate retrospectively.

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Both the attending on the summons and the giving of the notice of appeal were " steps " within the section.

Decision of Eve J. affirmed.

Appeal from a decision of Eve J. sitting in chambers.

By an indenture dated March 5, 1910, the defendant mortgaged certain freehold and leasehold hereditaments, subject to an existing prior mortgage, to the plaintiff to secure the sum of 1000*l.* with interest at 5 per cent. per annum. In June, 1914, the plaintiff and the defendant served cross-notices upon each other for the payment off of the mortgage. This not having been done, on July 15, 1915, the plaintiff issued the writ in this action to enforce his security by sale or foreclosure. On November 3 he took out a summons in chambers for directions. On November 9, 1915, the Master declined to make an order for pleadings and intimated that an account should be taken under Order xv. The matter then stood over to give the parties an opportunity of agreeing the amount due under the mortgage, and that was done. Upon the summons coming again before the Master on January 31, 1916, the defendant submitted that, having regard to the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), which had received the Royal assent on December 23, 1915, the plaintiff was barred from enforcing his security. (1) It was admitted that the

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(1) Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 Geo. 5, c. 97), s. 1, sub-s. 4: " It shall not be lawful for any mortgagee under a mortgage to which this Act applies, during the continuance of this Act, and so long as interest at the standard rate is paid and is not more than twenty-one days in arrear, and the covenants by the mortgagor (other than the covenant for the repayment of the principal money secured) are performed and observed, and so long as the mortgagor keeps the property in a proper state of repair and pays all interest and instalments of principal recoverable under any prior encumbrance, to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured."

Sect. 2, sub-s. 2: " This Act shall apply to a house or a part of a house let as a separate dwelling when such letting does not include any land other than the site of the dwelling house and a garden or other premises within the curtilage of the dwelling house, and where either the annual amount of the standard rent or the rateable value of the house or part of the house does not exceed— . . . . (*c*) in the case of a house situate property comprised in the mortgage was such as would bring the case within the provisions of the Act, and that all the conditions mentioned in s. 1, sub-s. 4, of the Act had been fulfilled. The Master upheld the objection and adjourned the summons to the Judge, who affirmed the Master's decision and stayed all proceedings in the action for the duration of the war and six months thereafter.

The plaintiff appealed.

G. M. Hildyard, for the appellant. The Act does not apply to a case where proceedings were instituted before it came into operation. Here both the service of the writ and the issue of the summons took place before that date. This Act affects vested rights and does not merely deal with matters of procedure; it is not retrospective. The Courts are bound to construe such Acts prospectively, unless the contrary is clearly expressed: *Wright* v. *Hale* (1); *Hitchcock* v. *Way* (2); *The Ydun.* (3) Where a plaintiff commences an action to enforce certain vested rights the action must be tried on the footing of those rights, and the plaintiff may take any steps in the action subject to the procedure of the Court.

[LORD COZENS-HARDY M.R. The Act does not take away any rights; it only suspends a particular remedy.]

That is equivalent to taking away rights pro tanto. No "step" has been taken since the Act came into operation. The attendance before the Master and the Judge was not a "step" within s. 1, sub-s. 4.

[SARGANT J. Is not this appeal a "step" in the action?]

No. If it were, a party might have to submit to an unjust order.

[LORD COZENS-HARDY M.R. The whole point is as to the meaning of a "step for enforcing his security."]

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elsewhere" (than in the metropolitan police district or Scotland) "twenty-six pounds."

Sub-s. 4: "Subject to the provisions of this Act, this Act shall apply to every mortgage where the mortgaged property consists of or comprises one or more dwelling houses to which this Act applies . . . ."

Sect. 5, sub-s. 2: "This Act shall continue in force during the continuance of the present war and for a period of six months thereafter and no longer . . . ."

(1) (1860) 6 H. & N. 227.

(2) (1837) 6 Ad. & E. 943.

(3) [1899] P. 236.

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Roope Reeve, for the respondent. It is admitted that rights accrued before the passing of the Act are not to be taken away by it unless the Act clearly says so. The submission is: (1.) The Act clearly does interfere at every step in the action. (2.) It does not take away any rights, but merely effects an alteration in procedure by enacting that during the prescribed period no steps shall be taken. It is contended on behalf of the appellant that the Act provides that no action shall be instituted. That is not so; it says that no step shall be taken for enforcing any right of foreclosure. The section applies not merely to the issue of the writ, but to every fresh step in the action.

[PHILLIMORE L.J. referred to *Rex* v. *Chandra Dharma*. (1)]

The action has been properly stayed in this case. [He also referred to the Annual Practice (1916), p. 2180.]

G. M. Hildyard in reply.

LORD COZENS-HARDY M.R. This appeal raises a curious point of law with regard to a mortgage for 1000*l*. executed in March, 1910, the mortgage interest becoming payable in June, 1910. In June, 1914, just before the war, the mortgagee and mortgagor served what may be called cross-notices upon each other for payment off of the mortgage. Then came the war, and the mortgagor did not pay off the debt according to his notice, and on July 15, 1915, a writ was issued by the mortgagee to enforce his security by foreclosure or sale. On November 3 a summons for directions was issued, and on December 22 an Act was passed which is entitled the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915. That Act dealt with certain kinds of mortgages of certain kinds of property only, but it is not disputed that the mortgage in question is one falling within the provisions of that statute. The Act contains this provision: [His Lordship read s. 1, sub-s. 4, of the Act.] The Act is to continue in force during the continuance of the war and six months after. All the conditions specified in the section have been fulfilled by the mortgagor in the present case. The Act received the Royal assent on December 23, 1915, but it is said that it can have no effect, in the absence of express language, upon a mortgage dated in 1910 on which proceedings for foreclosure were instituted on July 15,

(1) [1905] 2 K. B. 335.

1915. But at whose instance was the summons taken out on November 3 brought before the Master and then before Eve J. in turn? It was at the instance of the mortgagee. He it was who went before them and said that he was entitled to the common order for foreclosure nisi, to be followed in the ordinary course, unless the mortgage was redeemed, by foreclosure absolute. The Master and the learned Judge both refused his application on the ground that it was a step in the action for exercising the right of foreclosure of the mortgage.

There are two grounds on which it is said the appeal from Eve J.'s decision must be refused. First, that it was taking a step in the action when the mortgagee issued the summons and attended before the Master and subsequently before the learned Judge, asking them to make an order for foreclosure. That seems to me a step, and a most effective step, in the action. I do not rest my judgment on this, but I also think that counsel for the respondent is probably right in his contention that the Act ought to be deemed to have a retrospective effect, as it related to a matter of procedure. I prefer, however, to base my decision on the broader ground and on the precise language of the section and to say that the matters I have mentioned were really steps taken by the mortgagee for the purpose of enforcing his security and obtaining foreclosure, and that the taking any such step is absolutely prohibited by the Act.

There is another point which I might mention. It was argued by counsel for the appellant that the Act ought not to apply because an Act could not operate retrospectively to take away rights. I do not think that in this case the Act is taking away any right. It is merely suspending a particular form of remedy which might otherwise have been used to enforce the plaintiff's rights. Another difficulty in the way of the plaintiff is that he has come before this Court by way of appeal and asked for a declaration that he is "at liberty to proceed in the action with the exercise of his right of foreclosure or sale or of otherwise enforcing his security and recovering the principal thereby secured . . . . and that the costs of this appeal may be paid by the defendant." That also seems to me to be a step in the proceedings.

On all these grounds, but primarily on the first ground that I have mentioned, I hold that the learned Judge was right and that the appeal fails. There will be no costs.

PHILLIMORE L.J. I could not bring myself to accede to all the arguments of counsel for the appellant. In particular I cannot accept the view that no statute altering rights can be retrospective.

In my opinion statutes can operate retrospectively to affect rights, as when a statute shortened the time within which proceedings could be taken: *The Ydun* (1); or when it extended the time within which a prosecution for an offence could be commenced: *Rex* v. *Chandra Dharma.* (2) Two stronger cases than these could hardly be imagined. Therefore it is apparent that we must approach the construction of this statute upon the assumption that an Act affecting rights may have a retrospective operation.

I confess I should not myself regard the appellant as having taken any step in the action since the Act was passed, for I should be inclined to regard the attendance before the Master and the Judge as part of a step already taken before the Act was passed. Further, I should be very unwilling to say that he had taken a step by appealing, seeing that if there were no right of appeal it might involve a party having to lie down under an unjust order. It might indeed deprive him of all right of appeal for ever, for if the right of appeal were suspended till after the war the result might be that he would then be out of time for appealing.

I regard the whole matter as a very trifling one, for I respectfully disagree with the contention of counsel for the appellant that having issued the writ he would be entitled to proceed to final judgment. I think that the Act intervenes at every step in the proceedings, and although I hesitate to say that up to this the plaintiff has taken a step in the proceedings subsequent to the passing of the Act, there would be a most important step to be taken before the plaintiff could be entitled to a decree. Speaking with deference to my brethren, I think that I should have said that the proper course was not to stop the plaintiff getting an order for an account of what is owing on the mortgage; but in the result the difference is not material, and as they take the contrary view, the appeal must be dismissed.

SARGANT J. I am of the same opinion. It seems to me that the effect of this Act is not to destroy or take away any right, but merely to suspend certain remedies during the extraordinary state of affairs in which we are living, and to suspend in particular the right of a mortgagee, as in the present case, to take steps to enforce his security. That being so, we have only to construe the Act without any prejudice against it on the ground of its effecting a modification of the rights of parties. In my judgment it would clearly be inadmissible to assume that the fact of the writ having been issued before the Act was passed would entitle the plaintiff to take out a summons for directions or to bring in his account. And the only doubt in my mind arises from the fact that here the summons was actually issued before the Act came into operation, and that it is only the hearing of that summons which has taken place afterwards. On the whole, however, I think that an attendance at the hearing is a step within the meaning of the section, and that we can apply the decisions as to what amounts to taking such a step as precludes a defendant from applying to stay proceedings on the ground that there is a submission to arbitration. I refer in particular to the cases of *County Theatres and Hotels* v. *Knowles* (1) and *Richardson* v. *Le Maitre.* (2) In the latter of these cases an attendance by a defendant before the Master on a summons for directions taken out by the plaintiff and acquiescence without protest in a common form order for delivery of pleadings was held to amount to taking a step in the proceedings. Here also I think that the attendances before the Master and the Judge should be considered as steps in the proceedings. In any case the matter is, I agree, of trifling importance, because even if the plaintiff could obtain an order to bring in his account, the actual bringing in of the account would probably be taking a step within the meaning of the Act. And, again, if and when the plaintiff came to apply for a decree absolute he would undoubtedly be stayed having regard to the section in question. For these reasons I agree that the appeal must be dismissed.

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(1) [1899] P. 236.

(2) [1905] 2 K. B. 335.

Appeal dismissed.

Solicitors: *Victor Joseph Moulder; Collyer-Bristow & Co., for Titley & Paver-Crow, Harrogate.*

(1) [1902] 1 K. B. 480.
(2) [1903] 2 Ch. 222.

G. A. S.

C. A.

1916

YOUNGER J.

Jan. 21; *Feb.* 29.

C. A.

March 27, 28; *April* 7.

In re CHAFER AND RANDALL'S CONTRACT.

[1915 C. 3401.]

Vendor and Purchaser—Objections to Title—Notice of Trust—Recital in Deed—Practice of Conveyancers.

An abstract of title delivered to a purchaser under a contract for sale of freeholds disclosed a recital in a partition deed that H. B. F. (one of the parties thereto) was then seised of the freeholds in question and other hereditaments "as trustee partly for himself and partly for L. R. (the other party to the deed) as he the said H. B. F. did thereby admit":—

Held by Younger J. and the Court of Appeal, that, the recital being clear and unambiguous in its terms and in itself a sufficient declaration of trust, the purchaser was not entitled to inquire how the trust was created.

Malpas v. *Ackland* (1827) 3 Russ. 273 explained and distinguished.

ADJOURNED SUMMONS.

By a contract for sale dated July 31, 1915, John Chafer agreed to purchase from Leonard Randall the fee simple of certain premises at Ilford in the county of Essex.

In the abstract of title delivered to the purchaser it appeared as follows:—

By an indenture dated November 13, 1901, the hereditaments comprised in the present contract for sale were conveyed, together with other hereditaments, to H. B. Forbes and J. W. Neil in fee simple in consideration of a purchase price stated to have been paid by them out of moneys belonging to them on a joint account.

By an indenture dated November 11, 1913, and made between the said H. B. Forbes of the one part and the present vendor, L. Randall, of the other part, after reciting the death of J. W. Neil, it was recited that the said H. B. Forbes was then seised of the hereditaments comprised in the indenture of November 13, 1901, and other hereditaments as trustee partly for himself and partly for the said L. Randall, as he the said H. B. Forbes did thereby admit, and that it had been agreed between him and L. Randall that the said hereditaments and other hereditaments should be partitioned, and that the hereditaments thereinafter described and intended to be thereby conveyed should be taken by the said L. Randall as his share, and that it had been agreed that the said

L. Randall should pay to the said H. B. Forbes by way of equality of partition the sum of 20*l.*, and it was witnessed that the said H. B. Forbes, as to the whole of the hereditaments thereby conveyed as trustee, and as to all his own beneficial estate, title, and interest therein as beneficial owner, conveyed to L. Randall in fee simple, among other hereditaments, a portion of the premises comprised in the present contract.

The purchaser's solicitors investigated the title and made the following requisition (No. 15): "How did H. B. Forbes become seised of the hereditaments as trustee partly for himself and partly for L. Randall as recited in the indenture of November 11, 1913? If by deed, such deed ought to be abstracted and produced." The vendor's solicitors returned the answer: "This question has nothing to do with the title." Thereupon the purchaser's solicitors replied: "This requisition is repeated. Notice of a trust is given by the recital in the deed of November 11, 1913, and it appears that Mr. H. B. Forbes was then seised of the hereditaments as trustee thereof. An abstract of his title must be furnished, and the deeds produced for examination. Further requisitions may then have to be made, as the title is not now complete." The vendor's solicitors answered: "The recital gives fully the nature of the trust of which notice is given, and we are not disposed to give any further reply hereto."

Thereupon this summons, under the Vendor and Purchaser Act, 1874, was taken out by the purchaser asking that it might be declared that requisition 15 in respect of the title to the hereditaments comprised in the contract had not been sufficiently answered by the vendor, and that a good title to the said hereditaments had not been shown in accordance with the contract.

The summons came on for hearing before Younger J. on January 21, 1916.

C. A. Bennett, for the purchaser. The purchaser is entitled to have a further and better answer to requisition 15. The recital in the deed of November 11, 1913, gives the purchaser notice of a trust. Notice of a trust is notice of all the particulars of the trust: *Malpas* v. *Ackland* (1); *Perham* v. *Kempster* (2); Williams on

(1) 3 Russ. 273.

(2) [1907] 1 Ch. 373, 380.

Vendor and Purchaser, 2nd ed. p. 170. In *Malpas* v. *Ackland* (1) a recital that the property was held upon such trusts for the use of A., B., and C. (parties to the conveyance) "for such estates in possession, reversion, or remainder as they became entitled to after the death of D." was held to be notice of prior trusts in favour of other parties, which would have been discovered by an examination of the instrument creating the trusts which were referred to in the recital. The cases relied on by the other side are cases in which money has been invested on mortgage, which form an important class of exceptions to the general rule. In those cases the settled practice is to take the mortgage to trustees as joint tenants, without disclosing the trust, and on the appointment of new trustees to transfer by a separate transfer, with a recital only that the transferees have become entitled in equity: White and Tudor's Leading Cases, 8th ed. vol. ii. p. 226, citing *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (2) The decision of Pearson J. in that case was expressly based on the fact that the transaction was a mortgage transaction. The case was distinguished by Kekewich J. in *In re Blaiberg and Abrahams* (3) on the ground that in the former case the trust deed was not disclosed, but only the fact that the testator was a trustee, and that it did not appear that any persons other than the testator ever had anything to do with the trust. The passage on p. 239 of Williams on Vendor and Purchaser, 2nd ed., citing *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (2) shows that conveyancers look upon that case as a very strong decision.

[YOUNGER J. referred to Dart on Vendors and Purchasers, 7th ed. p. 17.]

H. C. Bischoff, for the vendor. This is purely a matter of established practice. It is recognized that it is for the benefit of the public that certain trusts should not be disclosed by the abstract. If all trusts had to be disclosed it would lead to very great inconvenience, and to get over this difficulty conveyancers have invented a device, which has been accepted by the Court, of introducing into conveyances to trustees a recital that the grantees are jointly entitled in equity to the property. If the recital is clear and unambiguous a purchaser will not be allowed to inquire as to the terms of the trust. This practice is clearly stated in Williams on Vendor and Purchaser, 2nd ed., at pp. 337 et seq.

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(1) 3 Russ. 273. (2) (1883) 24 Ch. D. 720.
(3) [1899] 2 Ch. 340, 346.

The recital in this case is clear and unambiguous. It amounts to a statement that A. holds the property in trust for B., which is equivalent to a statement that B. is entitled to it in equity. There is nothing in the recital which suggests that there must be a deed declaring the trust. In *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1) the words of the recital were substantially the same as in this case. That case shows that there is no magic in the use of the words "in equity." *Perham* v. *Kempster* (2) affords little assistance in the present case. In *In re Blaiberg and Abrahams* (3) it is difficult to see how the vendor could have resisted giving full information. *Malpas* v. *Ackland* (4) is distinguishable. There the recital was so vague as to invite criticism and to require the matter to be cleared up. Having regard to the ramifications in titles which exist in this country, it is very desirable that the practice which has hitherto been followed should continue to be recognized by the Court. It is submitted, therefore, that the purchaser is not entitled to any further answer to the requisition.

C. A. Bennett in reply.

Cur. adv. vult.

Feb. 29. YOUNGER J. stated the facts and continued: The question I have to determine, therefore, is whether the vendor is bound to return any further answer to the 15th requisition made by the purchaser. Now upon such a purely conveyancing question I have felt that it was necessary for me to proceed with very great caution lest I should express any opinion which might have the effect of disturbing titles. Accordingly, in addition to the very able argument on both sides by which I was much assisted, I have made it my business to ascertain in the most competent quarter the present conveyancing practice on the subject, any such settled practice, as James L.J. says in *In re Ford and Hill* (5), being looked upon as part of the common law. In the result, and so assisted, I have arrived at the conclusion that the practice on which conveyancers act with reference to the effect of such a recital as that with which we have here to deal is accurately stated by Mr. Cyprian Williams in his work on the Law of Vendor and Purchaser, 2nd ed., at pp. 238 to 240. He says this: "When lands are vested in trustees, it is frequently desired to keep notice of the trusts off the title. This is especially the case when mortgages are made to trustees"—I pause there to point out that in the opinion of the learned text-writer this particular practice is not confined to mortgage transactions—"and it has been the regular practice, whenever a mortgage is held by trustees, to represent in the mortgage deed that they are jointly entitled in equity as well as at law; and also, when such a mortgage has had to be transferred to give effect to an appointment of new trustees, to frame recitals in the deed of transfer which shall not disclose the trust." Then a little later on the learned author proceeds: "It has been held that, when recitals of this kind are met with, they may and indeed shall be accepted by a purchaser without inquiry." Again a little later on: "The acceptance of such statements seems to rest on the presumption that all things have been rightly done. Thus, if A. and B., who have been parties to deeds which have conferred on them an absolute title at law to some land or mortgage money, choose to acknowledge that the land or money belongs in equity to C. absolutely, a purchaser from them is justified in accepting this acknowledgment as rightly made and in assuming, without further evidence, that the whole beneficial title is, as stated, in C. And he is not bound to make and should refrain from making any further inquiry in the matter, such as whether the trust admitted by A. and B. in C.'s favour is declared by any document. He is, it is conceived, justified in such circumstances in accepting a conveyance of the land or a transfer of the mortgage from A. and B., with the concurrence of C., without making any further investigation of C.'s title or as to the nature of the alleged trust. Where the legal title is correct on the face of the abstract, the purchaser is not entitled to object to it on the mere suspicion of some equity adverse to the title." But further I am now satisfied that it is necessary that the recital be clear and unambiguous. If so, it is treated as giving notice of a trust for the parties named, and for no one else, and as not casting any obligation on the purchaser to make any further inquiries. If he has no notice aliunde to the contrary, he is absolutely safe in proceeding with his purchase without inquiring further; he is, in other words, not entitled to make such inquiry.

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(1) 24 Ch. D. 722.

(2) [1907] 1 Ch. 373.

(3) [1899] 2 Ch. 340.

(4) 3 Russ. 273.

(5) (1879) 10 Ch. D. 365, 370.

The practice may possibly have been open to question before the case of *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1), but since that case it has, I think, been quite settled, and a reference to it will be found in the judgment of North J. in the case of *London and County Banking Co.* v. *Goddard.* (2) And I have satisfied myself from the inquiries I have made that it would be disastrous to many titles if the practice were now disturbed. It is true that *Harman's Case* (1) related to a mortgage debt and security, and Pearson J. in terms only dealt with the matter as affecting that class of property and with the practice of keeping off the title trusts affecting mortgaged property; but—and, as I have indicated, this seems to be the view of Mr. Cyprian Williams—the principle must be the same, whatever the property is that is in question, and I cannot find anywhere that conveyancers recognize any distinction.

But, as I have said, the recital, if it is to have the desired effect, must be definite and complete, nor must it contain any ambiguous or equivocal statements, and on examination it will be found that the recital under consideration in *Malpas* v. *Ackland* (3), on which so much reliance was placed by Mr. Bennett on behalf of the purchaser, had this defect. The decision in *Malpas* v. *Ackland* (3) was itself, apart from the recital, absolutely right according to modern authorities, and, in particular, *Patman* v. *Harland* (4), which is always quoted on this branch of the law. For no lessee or purchaser who has not investigated his lessor's or vendor's title or has only investigated it partially can escape being fixed with notice of things which he must have discovered if he had investigated it, at all events to the full extent allowable under an open contract. Now in *Malpas* v. *Ackland* (3) the lessee, if he had investigated the title, even for seventeen years, must have been faced with the conditional surrender which had there been made and therefore was fixed with notice of the trusts thereby created, so that the defendant in the suit who

(1) 24 Ch. D. 720.

(2) [1897] 1 Ch. 642, 649.

(3) 3 Russ. 273.

(4) (1881) 17 Ch. D. 353.

claimed as a volunteer under the lessee had no case against the beneficiaries under the surrender, who were the plaintiffs.

And the report itself in *Malpas* v. *Ackland* (1) cannot be considered to be very satisfactory. There is, for instance, a misprint in the statement of the term of the lease on p. 274; it clearly was for sixty-one years, and not for twenty-one years, as is there stated, and, further, what is given as the "opinion" of Lord Lyndhurst is obviously a summary only of what he said. That opinion was, first, that the circumstances were such as to render it incumbent upon James Gomme to have made further inquiry, and, secondly, that he must be considered to have had notice of the title of Mrs. Malpas's children. The second proposition, namely, that James Gomme must be considered as having had notice of the title of Mrs. Malpas's children, is perfectly correct in accordance with the principle adopted in *Patman* v. *Harland.* (2) The first proposition, that the circumstances were such as to have rendered it incumbent upon James Gomme to have made further inquiry, does not necessarily mean more than that James Gomme ought to have made further inquiry into the title, and that as he did not do so he must be taken to have been fixed with notice of what he would have found if he had. The opinion does not explicitly state that the recital was the circumstance which rendered it incumbent upon James Gomme to make the further inquiries, but if it is contended, as Mr. Bennett did contend, that the recital was the important circumstance referred to, and Sir Edward Sugden certainly appears to have so argued, then the exact wording of the recital becomes important. The recital was that John Hannam was, at the time of his decease, seised to him and his heirs of the copyhold premises in question "upon trust for the use and behoof of William Malpas and Susannah his wife, and George Colman, for such estates in possession, reversion, or remainder as they became entitled to after the decease of Mary Colman." It is clear that this is not a definite recital such as there is in the deed of November 11, 1913, in the present case. There is no definite recital that the estates of the persons named in possession, reversion, or remainder extended to the complete customary estate in fee simple of the property. The estates are left vague and undetermined. In the next place the statement is that the trust was for the persons named for such estates in possession, &c., as they became entitled to after the decease of Mary Colman. Now this obviously suggests that upon Mary Colman's death the property descended or devolved in some way upon the named parties, and if it so descended or devolved that descent or devolution must have taken place by virtue either of succession to Mary Colman under some previous deed or instrument, or under her will or intestacy. This might well give notice that either Mary Colman's will or intestacy or some other deed affected the property, so that the lessee refrained from inquiry into the facts at his peril. In the result, therefore, the recital in *Malpas* v. *Ackland* (1) is of a totally different character from the kind of recital which, according to the modern practice of conveyancers, is treated as conclusive, namely, one which excludes all notice of interest on the part of any person except the individuals named as interested in the trust, and the recital in the deed of November 11, 1913, is of this character.

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(1) 3 Russ. 274.

(2) 17 Ch. D. 353.

In truth there is in all cases on this subject the underlying principle enunciated in *In re Ford and Hill* (2) and referred to in *Patman* v. *Harland* (3), namely, that the vendor is to be taken to have supplied an abstract of all material documents, and that the responsibility in this respect cast upon him by statute relieves him from being questioned as to the sufficiency, so far as this point is concerned, of the abstract. But of course it does not shut out the purchaser from a specific inquiry based upon a doubtful or ambiguous expression in a particular deed. In order, however, to support such an inquiry the purchaser must show that the expression in question would, under the doctrine of constructive notice, fix him with a liability unless he makes the inquiry. If the trust must necessarily have been declared by some prior existing instrument such inquiry would be necessary.

But in the present case the proposition cannot, I think, be accepted that the trust recited in the deed of November 11, 1913, must have been declared by a previous deed or instrument. trust of land may exist, notwithstanding that it is not evidenced

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(1) 3 Russ. 274.
(2) 10 Ch. D. 365
(3) 17 Ch. D. 353.

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in writing, though, except in special circumstances, the trust cannot be enforced unless there is a writing. A declaration of trust is usually a declaration of a trust already existing, but not previously declared in writing. If it is an instrument creating a trust it is in the nature of a settlement. And here there is a sufficient declaration of trust in the recital itself. It is therefore, I think, impossible to suggest that there must necessarily have been a previous instrument and that that instrument must be produced.

Malpas v. *Ackland* (1) has, apparently, never been commented upon in any judgment or text-book except in Dart's Vendors and Purchasers: see the passage in the 7th edition at p. 883. There the correctness of the decision is doubted. This passage, however, did not occur in any of the first four editions of the book and was included for the first time in the 5th edition, published in 1876, in which Mr. William Barber was co-editor with Mr. Dart. (2) *Malpas* v. *Ackland* (1) may, as I have shown, be differently dealt with, but the criticism in Dart may be read as a further indication that, if the interpretation of the decision now urged by the present purchaser be correct, the true principle applicable to cases of this sort would, in the opinion of these eminent conveyancers, have been by that decision improperly extended.

Under these circumstances the answer to the summons must be that the 15th requisition of the purchaser in respect of the title to the hereditaments comprised in the above-mentioned contract for sale has been sufficiently answered by the vendor; and the purchaser must pay the costs.

H. C. Bischoff. Will your Lordship declare that a good title has been shown?

YOUNGER J. No; it is one thing to say, if the purchaser is right, that no title has been shown, and another thing to say, if he is wrong, that a good title has been exhibited.

W. I. C.

C. A. The purchaser appealed. The appeal came on for hearing on March 27, 1916.

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(1) 3 Russ. 273.

(2) See pp. 864, 865.

C. A. Bennett, for the appellant, made use of the same arguments as in the Court below and also referred to *Carritt* v. *Real and Personal Advance Co.* (1), *London and County Banking Co.* v. *Goddard* (2), *Jones* v. *Smith* (3), Lewin on Trusts, 12th ed. p. 387, and Sugden on Vendors and Purchasers, 14th ed. p. 775.

H. C. Bischoff, for the vendor, was not called upon to argue.

Cur. adv. vult.

April 7. LORD COZENS-HARDY M.R. This is an appeal by the purchaser against the decision of Younger J., who has held that a requisition on title has been sufficiently answered. I might be content to say that I agree with the conclusion of the learned judge and with the reasons assigned by him in his very careful judgment, but as the point raised is important to conveyancers, I think I had better express shortly, in my own words, my reasons for affirming the learned judge.

By a conveyance of November 13, 1901, Mr. Corbett conveyed to Forbes and Neil some land at Ilford for 1765*l.* 16*s.* 3*d.* The purchase-money was stated to be paid out of moneys belonging to the purchasers on a joint account, and it was conveyed unto and to the use of the purchasers in fee simple. They took as joint tenants. There is no statement on the face of the conveyance that the purchasers were trustees, although the inference that they were so is undoubted. Neil died in February, 1908. A deed dated November 11, 1913, between Forbes of the one part and Randall, the present vendor, of the other part, after reciting the indenture of 1901 and the death of Neil, contained the following recital—I am reading from the abstract: "And reciting said H. B. Forbes was then seised of the said hereditaments as trustee partly for himself and partly for the said Leonard Randall as he did thereby admit and it had been agreed between them that the said hereditaments should be partitioned and that the hereditaments therein-after described and intended to be thereby conveyed should be taken by the said Leonard Randall as his share and that the said Leonard Randall should pay to the said H. B. Forbes by way of

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(1) (1889) 42 Ch. D. 263. (2) [1897] 1 Ch. 642.
(3) (1841) 1 Hare, 43.

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equality of partition the sum of 20*l.*" By the deed Forbes conveyed to Randall by way of partition part of the property conveyed in the deed of 1901, including the property agreed to be sold by Randall to Chafer. Requisitions were delivered in due course, the 15th requisition being in the following terms: "How did Forbes become seised of the hereditaments as trustee partly for himself and partly for L. Randall as recited in the indenture of November 11, 1913? If by deed, such deed should be abstracted and produced." The answer to this requisition was this: "This question has nothing to do with the title."

The argument before us of the appellant's counsel was that the purchaser had constructive notice of any trust there may be for any other person, and he relied upon *Malpas* v. *Ackland* (1) as supporting the proposition that a statement in the conveyance that an owner of the legal estate holds upon a trust gives notice of all the trusts affecting the property. I have examined the original decree in the Record Office, and I am satisfied it does not bear out the point for which the case was cited. The decision was plainly correct. The recitals in that case showed that the lessor, who had granted a lease for a term of sixty-one years, had not a good title. It is plain law that a lessee, or a purchaser from a lessee, is affected with notice of and takes subject to any defect in the lessor's title. In this point of view the action was really undefended. But the Master of the Rolls, afterwards Lord Lyndhurst, gave, so far as the meagre report shows, a very short judgment. He was of opinion "that the circumstances were such as to have rendered it incumbent on James Gomme to have made further enquiry; that he must be considered as having had notice of the title of Mrs. Malpas's children, and, therefore, that the decree ought to be according to the prayer of the bill." If he merely held that the documents which were recited (including the will under which the plaintiff's equitable title arose) gave notice of a trust, his opinion, if I may respectfully say so, was perfectly right. If, however, he thought that a recital that an owner of the legal estate is trustee for A. B. imposes any duty upon the purchaser to inquire whether he is not also trustee for somebody else, I think there is no justification for such a view. I do not entertain any doubt that a recital that an owner of the legal estate is trustee for A. B. under a will, or under a deed, affects a purchaser with notice of the contents of the deed or of the will. But that doctrine has no bearing upon a case where there is nothing more than a statement that he holds upon trust for A. B. Such a statement is an admission against interest by the owner of the legal estate. So far as I can ascertain, *Malpas* v. *Ackland* (1) has not been treated as an authority on this point, and it has been questioned in Dart's Vendors and Purchasers, 7th ed. p. 883. In my opinion *Malpas* v. *Ackland* (1), although rightly decided, cannot be regarded as an authority for the proposition for which it was cited.

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(1) 3 Russ. 273, 276.

We have had an elaborate argument as to the mode in which, where there is a change of trustees, the highly desirable and perfectly honest object of keeping the trust off the title has been or can be attained. Since the case of *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (2) it cannot be doubted that the mode referred to in Lewin on Trusts, 12th ed. at p. 386, is satisfactory. It was, however, suggested that that doctrine has no application except to a transfer of mortgages. I can see no foundation for this limitation. In that very case there had been a foreclosure decree and the property transferred was therefore land and not money. Moreover, in the common case of a money settlement containing a power to invest in the purchase of land, which power has been exercised, I feel no doubt that the entire trust property, both land and money, may properly be transferred to new trustees by the method referred to by Mr. Lewin. I may add that in my opinion the passages from Mr. Cyprian Williams' work on Vendors and Purchasers which are referred to by Younger J. correctly state the law.

The appeal must be dismissed with costs.

PHILLIMORE L.J. I need not repeat the circumstances which give rise to this appeal. They have been stated sufficiently by the Master of the Rolls. I agree with him that the judgment of Younger J. is right, and for the reasons which he gave in support of it. But it will be convenient that I should express them in my own language.

I apprehend that upon the purchase of real estate it is settled

(1) 3 Russ. 273.

(2) 24 Ch. D. 720.

law that if, in the course of deducing title, there appear upon the abstract a statement or recital of the existence of some deed or other instrument, the purchaser is fixed with constructive notice of all the contents of the instrument. If thereafter some claim arising out of the instrument be preferred, the purchaser will not be able to say that he trusted to the recitals or statements which appeared upon the abstract, and he will not be able to plead that he is a purchaser for value without notice. If, however, a good title both at law and in equity is deduced to a particular grantor A. B., and in the next assurance it is recited that A. B. is trustee of the whole or some part of the property for some defined estate or interest in favour of C. D., and C. D. joins in the assurance for the purpose of conveying or releasing his estate or interest, a subsequent purchaser is not bound to inquire into the circumstances in which C. D. acquired his estate or interest, is not bound to assume that it was created by an instrument, and is not fixed with constructive notice of the contents of the instrument if there should prove to have been one. A. B., who according to the previous documentary title has the absolute and unencumbered estate, has made an admission against interest, and his admission lessens his estate to the extent to which he admits and in favour of the person or persons in whose interest he admits, but no further. This principle is well illustrated in Lewin on Trusts, ch. xiv., s. 4, par. 37. Mr. Lewin is there dealing with the familiar case of trustees who have money to invest on mortgage, and is stating the recognized practice of conveyancers whereby the trusts of the instrument under which they are trustees are kept off the title to the property mortgaged. He points out that a formula, once in vogue, and having the authority of Jarman's Bythewood, that the mortgagees are trustees is unsafe. This seems obvious. There is a declaration against interest, but nothing to show in whose favour the title is cut down, and therefore no release is obtained from the unknown beneficiary. But Mr. Lewin proceeds to show that in the common case where new trustees are from time to time appointed, and it is necessary to get a conveyance which will not appear to be a voluntary one from the old to the new trustees, it is right and proper to express that the grantors are trustees for the grantees to whom they are now passing the legal estate, and such a declaration, while affording sufficient consideration for the conveyance, does not bring upon the title the instrument or instruments under which, in fact, the old trustees had become trustees for the new trustees.

The illustration is taken from the case of mortgage, and it is most often in the case of mortgages that the point will arise. But in *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (1) the point arose after foreclosure of a mortgage and with regard to the conveyance of the foreclosed estate. And it was there held that where the executrix of the mortgagee, having foreclosed the mortgage, purported by a deed, reciting that her testator had held the mortgage on account of three persons named, to convey the estate to them, she was, though an executrix, entitled to put his recital into the deed, and that the purchasers were " entitled to rely on it as a protection against any trusts of the property which may exist."

Some reliance was placed in the argument before us upon the use of the phrase " on account of " instead of " as trustees for." But the principle is the same. Particular admission against interest is made, and then the interest so admitted is got in.

In *In re Blaiberg and Abrahams* (2) Kekewich J. explains this case and affirms, while distinguishing, its principle. I quote: " Perhaps I ought to say that *Harman's Case* (1) does not govern this case because there the trust deed was not disclosed. All that was disclosed was that the testator was a trustee, and it did not appear that any persons other than the testator ever had anything to do with the trust."

The only decision which appears to create any difficulty is that relied upon by counsel for the appellant—*Malpas* v. *Ackland.* (3) In that case as reported—not altogether carefully—an argument was offered on behalf of the successful plaintiffs which, if sound, would contravene the principle which I have stated. But there are two observations to make. Upon the facts stated in the report, and which, by inspection of the original record, we find were stated in the plaintiffs' bill, the plaintiffs were bound to succeed. The defendant was the assignee of a lease for sixty-one years created by a lessor who admitted that he was a trustee. And a lease of this length, and of the particular nature of which it was, was not

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(1) 24 Ch. D. 720.

(2) [1899] 2 Ch. 340, 346.

(3) 3 Russ. 273.

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one that would come within the ordinary powers of a trustee. It was necessary, therefore, to make the beneficiaries parties, and a recital was inserted to show who they were and what their interest was. The recital was incomplete, and excluded those beneficiaries who afterwards became the plaintiffs. This recital could not be conclusive, because a lessee, just as much as a purchaser, has the obligation to inquire into his lessor's title. And an investigation of the title would have shown that only seventeen years before the property—which was copyhold—had been surrendered to the uses of a will, and the will which contained the limitations in question was therefore upon the title.

The case need not have been put on the question of notice, but on a direct infirmity of title. The lessor had not the power to make the lease which he purported to make. The argument therefore was unnecessary. But further, as Younger J. has pointed out, the actual recital that the trustee was seised of the copyhold " upon trust for the use and behoof of William Malpas and Susannah his wife and George Colman for such estates in possession, reversion, or remainder, as they became entitled to after the decease of Mary Colman, and that the trust had devolved on Henry Hannam," was a sufficiently plain indication that there was, if not an instrument creating an original interest, at least some instrument or act in law passing the interest to Malpas and his wife and George Colman upon the decease of Mary Colman.

The case of *Malpas* v. *Ackland* (1) seems to have been mentioned with some approval, but quite incidentally, in *Jones* v. *Smith.* (2) It is rarely cited in text-books, and has been commented upon adversely. If it be merely a decision that where upon an assurance there is a recital of an instrument creating a trust he who takes under that assurance has constructive notice of all the trusts created by the instrument, it is only in accordance with well-recognized law. As a decision on the particular circumstances that where enough is recited to show that there must be a deed there will then be constructive notice of the deed, though a deed be not actually mentioned, it may be of some little importance. If it goes any further, I humbly conceive that it is not good law.

Upon the whole, as I have said, I think that this appeal fails.

(1) 3 Russ. 273.

(2) 1 Hare, 58.

SARGANT J. I am of the same opinion. It has not been contended by the appellant here that the recitals in the indenture of November 11, 1913, indicate that the beneficial interest acknowledged in favour of the present vendor was in any way derived from James Wells Neil, or that though the latter and Henry Bracey Forbes were expressed in the indenture of November 13, 1901, to buy and to take as joint tenants they were in fact co-adventurers or tenants in common so that the survivor would hold partly as trustee for the other. It is accepted that the object of reciting the indenture of November 13, 1901, and the death of James Wells Neil was merely to show a complete title in fee simple in Henry Bracey Forbes, and that the statement as to the beneficial interest of the present vendor may be treated as an admission of a trust which is disconnected from the preceding recitals and may have arisen altogether independently of James Wells Neil and subsequently to his death. Nevertheless it is argued that the bare statement in the indenture of November 11, 1913, as to the trust in favour of the present vendor puts a purchaser upon inquiry as to the origin and nature of their trust, and would, in default of inquiry, render his title bad as against any other cestuis que trust of Henry Bracey Forbes who have not been satisfied and as to whose existence and interests the purchaser would have become informed in the course of such an inquiry.

It is difficult to discover any sound principle on which this contention can be based. Assuming, as is admitted here, that an indenture discloses what is on the face of it an absolute legal and beneficial title in A., and that A. then proceeds to admit that either in whole or in part he holds for the benefit of or in trust for a definite named person B., I can see no sufficient reason for any inference that A. holds upon any additional or further trust than that disclosed, or that the acknowledged trust originates in any document the examination of which might disclose any such further trust. The admission or acknowledgment is one against interest, and, of course, binds the person making it to its full extent. But there is no reason for enlarging that extent. The very candour of the admission is in favour of its completeness. A trustee who is concealing a trust in favour of C. is not likely to be openly acknowledging at the same moment a trust in favour of B.

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But it is said by Mr. Bennett that the contrary has been decided in a case of *Malpas* v. *Ackland.* (1) The report of that case is unsatisfactory, but the decision may no doubt be supported on either of two grounds. In the first place any ordinary investigation of the title of the lessor must certainly have resulted in the disclosure of the trusts on which the plaintiff relied; and such an investigation can only be neglected at the peril of a lessee: *Patman* v. *Harland.* (2) And in the next place the reference to the trusts on which John Hannam held was couched in such terms as obviously to suggest what was actually the fact, namely, that there was a series of successive trusts of which those in favour of William Malpas and Susannah his wife and George Colman formed a part only. I cannot find that any subsequent case has relied on *Malpas* v. *Ackland* (1) as establishing the wide proposition contended for by Mr. Bennett; and if it does purport to establish that proposition it is in conflict with later authorities, such as *In re Harman and Uxbridge and Rickmansworth Ry. Co.* (3) and *London and County Banking Co.* v. *Goddard* (4), and cannot, in my judgment, be any longer relied on. The first of these two cases indeed went very much beyond anything that is necessary here, since it not only negatived any obligation to inquire into the origin and nature of the trusts on which the deceased mortgagee had held his mortgage, but accepted as against the beneficiaries under his will the statement of the surviving trustee of that will that the deceased had not held beneficially.

Great weight ought also to be attached to the practice of conveyancers in such matters. A common but by no means solitary instance is afforded by the method adopted when on a change of trustees mortgages belonging to the trust have to be transferred from the former trustees to the new trustees. The original mortgages have, of course, been taken in the joint names of the trustees without any disclosure of the trust, and it is equally necessary or desirable that no such disclosure should be permitted on the transfer. A bare recital is accordingly used to the effect that the new trustees have become entitled to the mortgage moneys on a joint account in the place of the old trustees, or that the old trustees now hold

(1) 3 Russ. 273.
(2) 17 Ch. D. 353.
(3) 24 Ch. D. 720.
(4) [1897] 1 Ch. 642.

the mortgage moneys upon trust for the new trustees, or to some other effect showing that the old trustees admit that their legal title has become subject to an equitable or beneficial title on the part of the new trustees as ordinary joint owners entitling the latter to a transfer. And such a recital is universally accepted as sufficient on any subsequent investigation of title by a purchaser or mortgagee. But the validity of such a recital obviously rests upon the principle that the acknowledgment by the apparent legal owner of a limitation or negation of his legal ownership by means of a trust or its equivalent in favour of named persons is to be accepted at its face value and does not involve any obligation to go behind the definite, acknowledged trust, or to inquire into its origin.

In my view the judgment of the learned judge was quite right and should be affirmed.

Appeal dismissed.

Solicitors: *Bennett & Ferris; Forbes & Son.*

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Jan. 11, 20.

C. A.

May 4, 5.

In re LODWIG.

LODWIG *v.* EVANS.

[1915 L. 1772.]

Will—Construction—Bequest to Children when the Youngest attains Thirty —Children dying under Thirty not excluded—Contingency not implied —Remoteness.

The testator gave his residuary realty and personalty to trustees upon trust to sell and convert and out of the proceeds to pay a weekly sum to his daughter-in-law K. L. until the youngest of her children by his son should attain the age of thirty years, and he directed that after the youngest of his said grandchildren should attain that age the trust funds should be divided between K. L. and her said children in equal shares, and in the event of any one of his said grandchildren dying leaving lawful issue him or her surviving the share of the parent so dying should be divided between his or her children :—

Held, that there was no canon of construction compelling the Court by implication to introduce into the gift to the class the contingency of attaining the age of thirty years, and that, upon the construction of the particular will, the interests of grandchildren who survived the testator were vested and not contingent upon their attaining the age of thirty years.

Held, therefore, that the direction to divide amongst K. L. and her children was not void for remoteness.

Decision of Sargant J. affirmed.

Leeming v. *Sherratt* (1842) 2 Hare, 14, *Parker* v. *Sowerby* (1853) 1 Drew. 488, and *Lloyd* v. *Lloyd* (1856) 3 K. & J. 20 considered and explained.

Dictum of Wigram V.-C. in *Leeming* v. *Sherratt*, 2 Hare, 23, disapproved.

John David Lodwig, by his will dated April 9, 1915, appointed David Walter Evans, Abraham Bevan Davies, and the testator's son David John Lodwig executors and trustees of his will, and, after giving some pecuniary legacies and bequeathing certain household effects to his daughter-in-law Katie Lodwig, the wife of his son D. J. Lodwig, the testator gave his residuary real and personal estate unto and to the use of his trustees upon trust to sell and convert the same, and out of the proceeds to pay his funeral and testamentary expenses, debts, and legacies, and to invest the residue of the moneys in manner thereby directed. The will then provided that the trustees should out of the income of the investments pay certain small annuities, expressed as weekly sums, and proceeded as follows: "And shall also pay thereout to my daughter-in-law the said Katie Lodwig for the benefit of herself and her children the sum of 5*l.* per week, the same to continue to be paid until the youngest of her said children by the said David John Lodwig attains the age of thirty years, and, in the event of either of my said grandchildren marrying in the meantime, I direct that my said trustees shall pay to each such child from the date of his or her marriage the sum of 2*l.* per week, but when the youngest of such children shall attain the age of thirty years the above payments of 5*l.* per week and the 2*l.* per week to each married child shall absolutely cease and determine." There were then trusts for the payment of certain other annuities, including an annual remuneration of 25*l.* per annum for each of the trustees, and then came the following provisions, namely: "And I direct and declare that, after the youngest of my said grandchildren (the children of my daughter-in-law Katie Lodwig by her husband the said David John Lodwig) shall attain the age of thirty years and the said payments of 5*l.* per week and 2*l.* per week to each married child shall have ceased as aforesaid, that such part of the capital of my residuary trust funds as shall not be required to provide any of the annual payments hereinbefore directed to be made by this my will shall be divided between my said daughter-in-law Katie Lodwig and her children (the children of the said David John Lodwig) in equal shares as tenants in common, and in the event of any one of my said grandchildren dying leaving lawful issue him or her surviving the share of the parent so dying shall be divided between his or her children in equal shares as tenants in common. And I also direct and declare when the last of the annual payments herein directed to be made shall have ceased that the investments out of which the same have been paid shall be divided between my said daughter-in-law Katie Lodwig and my said grandchildren in equal shares as tenants in common in the same manner as is hereinbefore declared."

The testator by a codicil dated April 14, 1915, gave further pecuniary bequests, but in all other respects confirmed his will. He died on April 24, 1915, and his will and codicil were proved by D. W. Evans and A. B. Davies alone. He had been married only once, and his wife died in 1913. The three children of the marriage were Catherine (who died in 1869 aged six months), David (who died in 1869 aged three years), and David John Lodwig, who by his marriage with Katie Lodwig had six children, namely, Katie (who died in 1912 aged five years) and Annie Marie, Doris, Eva, John Watkin, and Margaret, who were all infants.

D. J. Lodwig, the heir-at-law and sole next of kin of the testator, took out an originating summons against D. W. Evans and A. B. Davies, the executors and trustees of the will and codicil, and Katie Lodwig (the wife of the plaintiff) and the four of her infant children who had then been born, asking for a declaration that the trusts by the will declared for the benefit of Katie Lodwig (other than the direction for the payment to her of a weekly sum) and the trusts thereby declared for her children by the plaintiff were void for remoteness, and that, accordingly, subject to the legacies and weekly and annual payments given and directed to be paid by the will and codicil, the realty and personalty of the testator were undisposed of by his will; and that proper provision might be made for the said legacies and periodical payments, and that subject thereto the said real and personal estate might be conveyed and transferred to the plaintiff.

A fifth child of the plaintiff and Katie Lodwig was born after the summons had been issued, but his Lordship held that she need not be added as a party.

Romer, K.C., and *J. G. Wood*, for the plaintiff.
R. Rowlands, for Mrs. Lodwig and her children.
Owen Thompson, for the trustees and executors.

Cur. adv. vult.

Jan. 20. SARGANT J. (after stating the claim made by the summons). The plaintiff's right as claimed by the originating summons is a present one, and involves an immediate dealing with the estate or a considerable part of it, and I am therefore bound to deal with it even if in so doing the construction of the gifts amongst the plaintiff's children inter se should have to be considered. But, inasmuch as any such consideration might prejudice these children in the future, I desire as far as possible to limit my judgment to what is strictly necessary for dealing with the present question. It is for this reason, and also because the interpretation of this will is said to be concluded by an alleged general canon of construction, that I have reserved judgment, and not because I have had any real doubt as to the conclusion I ought to arrive at.

The testator's will contains very usual provisions for the sale and conversion of his real and personal estate, for payment of testamentary expenses, debts, and legacies, and for the investment of the residue or balance of the proceeds of sale and conversion. It then provides that the trustees shall out of the income of these investments pay certain small annuities expressed as weekly sums, and proceeds as follows : [His Lordship read the direction in the will to pay 5*l.* per week to Katie Lodwig and 2*l.* to her children and, after stating that there were then trusts for the payment of other annuities, including an annual remuneration of 25*l.* per annum for each of the trustees, and reading the remaining portions of the will set out above, continued as follows :]

On these words the plaintiff says that the direction to divide between Katie Lodwig and her children by the plaintiff is too remote, because it is, on its true construction, a direction to divide between her and such of her children by the plaintiff as attain the age of thirty years, this contingency being introduced into the class by implication from the circumstance of the division not being directed until after the youngest of them has attained the age of thirty years. And in support of this view he relies on the cases of *Leeming* v. *Sherratt* (1), *Parker* v. *Sowerby* (2), and *Lloyd* v. *Lloyd.* (3) It is curious that no one of these cases (all of which relate to a distribution on the youngest member of a class attaining twenty-one years) amounts to an actual decision in favour of introducing the contingency. In *Leeming* v. *Sherratt* (1) the decision was only that those attaining the age of twenty-one took vested interests thereupon and were not excluded by death subsequently and before the period of distribution ; and this was again the case in *Parker* v. *Sowerby* (2), since it is clear from the report that both of the children who were dead had attained the age of twenty-one years. Further, in *Lloyd* v.

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(1) 2 Hare, 14. (2) 1 Drew. 488.
(3) 3 K. & J. 20.

Lloyd (1) the gift was to such child or children, so that the contingency was expressly introduced by the word "such." Indeed, the case of *Coldicott* v. *Best* (2), which is merely noted in the *Weekly Notes*, and therefore hardly to be relied upon as a complete authority, appears to be the only reported, or rather half-reported, case in which a child failing to attain twenty-one was excluded on the ground of implication of contingency from the period of distribution. It is also to be noted that the reason given in one of the cases, namely, *Lloyd* v. *Lloyd* (1), that the testator intended that those to take the capital should be those receiving the income at the time of distribution, is a reason perhaps hardly compatible with the decision in *Leeming* v. *Sherratt* (3) that the class to take included those who had attained twenty-one but died before the period of distribution.

On the whole it may well be that in the case of gifts by way of division amongst children on the youngest attaining twenty-one, substantially similar to those in *Leeming* v. *Sherratt* (3), *Parker* v. *Sowerby* (4), and *Coldicott* v. *Best* (2), the Court would be bound to introduce into the qualification or definition of the class to take the contingency of attaining twenty-one. But I cannot take those decisions as laying down any general principle of construction applicable to gifts to classes at any age, however late ; and in any case the presumption is slight and may very easily be rebutted. Under the present will the distribution is not to take place until the youngest child has attained as late an age as thirty, and the words of actual denotation of the takers, which are elaborate and precise, include Katie Lodwig herself, and are separated by a considerable interval from the words defining the period of distribution. And, further, if the grandchildren to take are only to include those attaining thirty, the proviso substituting issue of any of the testator's said grandchildren will not apply to grandchildren dying under thirty, and there will be no provision for such grandchildren or their issue. This is a consequence which would in any case tend against this construction of the gift to grandchildren, and is here really fatal to the construction, having regard to the clear recognition earlier in the will of the propriety of marriage before thirty as evidenced by the express provision of income there made in favour of grandchildren

(1) 3 K. & J. 20.
(2) [1881] W. N. 150.
(3) 2 Hare, 14.
(4) 1 Drew. 488.

so marrying. In my opinion, there is not in this case any sufficient reason for introducing into the very definite description of the persons to take any such hypothesis or contingency as claimed.

Accordingly I propose to make a declaration that the trusts declared by the will in favour of the children of Katie Lodwig are not void for remoteness, and that the plaintiff is not now entitled to the conveyance or transfer to him of any part of the capital of the residue of the testator's estate.

F. E.

C. A.

The plaintiff appealed. The appeal came on for hearing on May 4, 1916.

Romer, K.C., and *J. G. Wood*, for the appellant. Upon its true construction the direction to divide between Katie Lodwig and her children by D. J. Lodwig is a direction to divide between her and such of her children as attain the age of thirty years. This contingency is to be introduced into the class by reason of the division not being directed until after the youngest of them has attained the age of thirty years: *Leeming* v. *Sherratt* (1); *Parker* v. *Sowerby* (2); *Lloyd* v. *Lloyd.* (3) These authorities, if they do not establish an arbitrary rule of construction, at any rate go to show how such a disposition as that under consideration will be construed by the Courts. In *Leeming* v. *Sherratt* (1), where the direction was to pay and divide " so soon as my youngest child shall attain the age of twenty-one, unto and equally amongst my children share and share alike," Wigram V.-C. said: " The testator having postponed the division of the residue until his youngest child attained that age, I think no child, who did not attain that age, could have been intended to take a share therein." That perhaps was not more than a dictum, but it was followed in *Parker* v. *Sowerby* (2) and *Lloyd* v. *Lloyd* (3) and has been generally accepted by the profession. It is stated as a rule in Hawkins on Wills, 2nd ed. p. 279; see also Theobald on Wills, 7th ed. p. 590. In *Cooper* v. *Cooper* (4) the gift was to children by name and not as a class, and therefore the rule of construction, which was recognized, did not apply. In *Coldicott* v.

(1) 2 Hare, 14, 23.
(2) 1 Drew. 488.
(3) 3 K. & J. 20.
(4) (1861) 29 Beav. 229.

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Best (1) a child failing to attain twenty-one was excluded presumably on the ground of implication of contingency from the period of distribution. The true construction in this case is that those of the testator's grandchildren who attain the age of thirty years take, and those who do not are excluded. The gift, therefore, transgresses the rule against perpetuity and is void.

R. Rowlands, for the respondents, Mrs. Lodwig and her children, was not called upon.

Owen Thompson, for the trustees and executors.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Sargant J., who has held on the construction of a somewhat obscure will that grandchildren do not take merely contingent interests in the gift. Now I thought at first this case was to be argued, and was being argued, on the footing that there was a definite and ascertained rule of construction which had been so long established that it ought not to be interfered with without very great consideration. But I have been greatly relieved to find, as Mr. Wood has expressly said, that he does not rely upon any such rule. But he says a certain interpretation has been put by learned judges sitting in Courts of first instance upon clauses which are practically identical with this, and that the construction which they have put upon clauses of this kind ought not now to be interfered with by us.

Now, remembering that there is no such rule of construction and that our first duty is to construe this particular will before us, the question arises whether, if in our judgment we think that the view which Sargant J. has adopted is right, we are prevented by anything that has been decided in prior cases from giving that construction to this will which we think to be the true one.

Before discussing the authorities let us consider this will itself. [The Master of the Rolls then referred to the terms of the will and continued :] It is said that on the construction of this will you must assume that the class of children to take cannot be ascertained until the youngest attains thirty and that any child dying before that period without having himself or herself attained thirty can take no share, but the share only passes contingent upon that event. Apart

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(1) [1881] W. N. 150.

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from authority there is nothing which suggests contingency to my mind in the language of the will. It is a mere question of construction. I can see nothing to suggest that there is any contingency in the matter. I am supported in that view by the following clause containing the gift over: "In the event of any one of my said grandchildren dying leaving lawful issue him or her surviving the share of the parent so dying shall be divided between his or her children in equal shares." That seems to me to show that what the testator was leaving to the grandchildren in that case was not a mere contingent gift which might never take effect, but was a gift to them of a share which in the event of their death before the period of distribution their children would take. I therefore upon the construction of this will alone have no hesitation in saying that in my view its true effect is that which has been given to it by Sargant J.

But then it is said there are certain authorities which have been treated by very eminent text-book writers, particularly by Mr. Vaughan Hawkins, as establishing what is called a rule. It seems to me quite clear that the authorities have established no such rule. The first case is *Leeming* v. *Sherratt.* (1) There there was a gift of residue to trustees in trust to sell and "to pay and divide the money arising therefrom so soon as my youngest child shall attain the age of twenty-one, unto and equally amongst my children share and share alike." The decision was that the share of a child (John Leeming) who had attained twenty-one, but who died without leaving lawful issue before the youngest of the children had attained twenty-one, was a vested interest and was transmissible to his representatives. That was the only decision on that point, although the Vice-Chancellor there said: "I have noticed the fact that John Leeming had attained twenty-one, for this reason:—the testator having postponed the division of the residue until his youngest child attained that age, I think no child, who did not attain that age, could have been intended to take a share therein." That is nothing more than a dictum, a dictum by a very eminent judge in this branch of the law; but still it is nothing more than a dictum, and is very far from establishing any general principle by which we ought to be bound.

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(1) 2 Hare, 14, 23.

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Then the next case is the decision of Wood V.-C. in *Lloyd* v. *Lloyd.* (1) There, according to the marginal note, "A devise of land to trustees in fee, upon trust to pay the rents to the testator's daughter for life, and after her death to apply them in the maintenance of all and every her child and children, during their minority, and when and as soon as all such children, if more than one, should have attained twenty-one, upon trust to sell, and to pay the proceeds of such sale 'to and amongst all and every such child or children, share and share alike if more than one, and if but one, then the whole thereof to such only child:'—Held, that one of several children who survived the testator, having died under twenty-one, took no share."

Now that decision seems to me to be very remarkable, because it is based upon the view that those who take the capital must be those receiving the income at the time of distribution, which can only be supported if *Leeming* v. *Sherratt* (2) be wrong. *Leeming* v. *Sherratt* (2) decided that a child who had died after having attained twenty-one, but before the period for division, took a vested interest which passed to his executors. The Vice-Chancellor, Sir W. Page Wood, in *Lloyd* v. *Lloyd* (1) said: "it is plain to my mind, that the testator never intended that those children who died under twenty-one should have such an interest that their executors should receive their shares of the rents until all the children should have attained twenty-one"; and again he says lower down: "According to *Parker* v. *Sowerby* (3), and a dictum in *Leeming* v. *Sherratt* (2), where there is a gift of this kind, the testator intends that the parties who are to take should be those who at the time are found in the enjoyment of the rents and profits—those for whom he has provided until the period of distribution." That is quite inconsistent with the actual decision in *Leeming* v. *Sherratt* (2), which decision was that a child having attained twenty-one, but dying before the period of distribution, nevertheless took. With great respect to the Vice-Chancellor (Sir W. Page Wood) who decided that case, I think that it does not lay down any intelligible principle for the mode of construction which he adopted or for the rule which he treated as being applicable.

(1) 3 K. & J. 20, 25.
(2) 2 Hare, 14.
(3) 1 Drew. 488.

Then we come to *Parker* v. *Sowerby* (1), a decision of Kindersley V.-C. There a testator devised his real estate to trustees with power to let until all his nephews and nieces should attain twenty-one, and after his youngest nephew or niece should be of age, then he directed his estates to be sold and the produce to go amongst all his nephews and nieces except two by name; and it was held that the interests of the nephews and nieces vested in all who attained twenty-one, whether dying before or surviving the period directed for sale. The Vice-Chancellor, after dealing with another point in the case, said: "I am of opinion that upon the authorities generally, this is a vested interest in the nephews and nieces who attained twenty-one, whether they did or did not survive the period at which the sale is directed. But if any of them did not attain twenty-one, such nephews and nieces did not (on the authority of *Leeming* v. *Sherratt* (2)) take any interest." That was treating *Leeming* v. *Sherratt* (2) as an authority for that proposition, but, in my opinion, it does not really apply to the case. It is treating the dictum of Wigram V.-C. as an authority for a proposition which I think cannot be supported.

The next and, I think, the only other case to which our attention is called is Sir John Romilly's decision in *Cooper* v. *Cooper*. (3) He there distinguished the case of *Leeming* v. *Sherratt* (2) upon the ground that the gift he was considering was not a gift to a class at all, but to four individuals. He says, after referring to *Leeming* v. *Sherratt* (2): "The distinction between that case and the present is this:—in that case, the class to take were the children who had attained twenty-one; and this is established by the circumstance, that the division of the residue is not to take effect until the youngest of the class attained twenty-one, and, therefore, the class was to be ascertained at the time. In this case, if the disposition of the residue had stopped at the word 'children,' I should have agreed in the contention that the case of *Leeming* v. *Sherratt* (2) governed it; but the testator goes on to say, that William is to have one-fifth, Thomas one-fifth, Sarah Anne one-fifth, and John Henry two-fifths." And then he points out the plain distinctions. Now in these circumstances, even if there had been a rule of construction applicable to the attainment of twenty-one, I certainly should not have been prepared to extend that rule, for which I can see no foundation, to an entirely new case, postponing not only the division but postponing the contingent class for so long a period as thirty years, and I am prepared to base my judgment upon what substantially was the view of Sargant J.—that upon the construction of this will there is nothing to make the gifts to these grandchildren contingent merely by reason of the fact that postponement of the division is directed until the youngest grandchild attains thirty. For these reasons I think the decision is perfectly right, and that the appeal should be dismissed.

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(1) 1 Drew. 488, 496.
(2) 2 Hare, 14.
(3) 29 Beav. 229, 231.

PICKFORD L.J. I am of the same opinion. The question is, What is the meaning of this will ? It is admitted by the appellant's counsel that the rule of construction which we are asked to apply is not an arbitrary rule of construction, but they say that the real interpretation of the words of this will is to be ascertained by reference to the construction put by learned judges previously upon clauses in similar wills. From that point of view the question must always turn upon the actual words of the will under consideration ; and in this case, looking at the words of this will which we have under consideration, I am of opinion that Sargant J. put the right construction on it, and I do not wish to repeat the reasons that have been given, because I agree with those that were given both by the learned judge in the Court below and also a very few moments ago by the Master of the Rolls.

NEVILLE J. I am of the same opinion. The words of the will here are, I think, clear and express ; and under the words used no obligation is imposed upon the grandchildren to attain the age of thirty years before they can take a vested interest. But it is said that by implication an obligation of that character ought to be introduced or added to the words which the testator has used ; and it is said that we ought to add these words by implication because in some cases which have been cited, where there has been a gift when the youngest of a class attains twenty-one, it has been held that an implication of necessity to attain twenty-one should be read into the will. No satisfactory reason, even in those cases, for the introduction of such an implication has been suggested by the learned judges who have decided the cases. In the only case in which a reason was sought to be given that reason was unfortunately inconsistent with the decision itself; and it appears that the reason given at the Bar is the only reason that holds the field, and that is that the reference to the age of twenty-one indicates a mistrust of youth, and if such a reference to twenty-one indicates a mistrust of youth, so a reference to thirty may indicate a mistrust of comparative youth. Now I confess I do not think that the Court ought to resort to implication except in case of necessity; and I think it is far more probable here that the testator was actuated, not by mistrust of youth, but by a desire that when the estate came to be divided it should be greater in amount than it would have been had it been divided at an earlier date.

Solicitors for appellant: *Sharpe, Pritchard & Co., for Edward Powell, Neath.*

Solicitors for trustees: *Lambert & Hale, for R. & C. B. Jenkins & Lloyd, Swansea.*

Solicitors for Katie Lodwig and her children: *Rhys Roberts & Co., for J. Conway Lewis, Swansea.*

G. A. S.

NEVILLE J.
1916
April 5, 6.

In re WILLIAMS.
JONES *v.* WILLIAMS.

[1912 W. 2603.]

Trustee—Administration—Originating Summons—Accounts—Statutes of Limitation—Order, Form of—Trustee Act, 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8.

Where an originating summons for accounts is issued against trustees or executors entitled under s. 8 of the Trustee Act, 1888, to limit their liability to six years before the date of the summons, the defence of the statute must be raised at the time the order to account is made, so that it may be qualified by a reference to the statute or the point may be reserved for the Court on the further consideration. Otherwise it will be too late to set up the statute for the first time on the hearing on further consideration, or even when the accounts are being vouched before the Master.

ADJOURNED SUMMONS.

H. Williams, of Llanelly, provision merchant, duly made his last will dated May 18, 1895, and thereby, after appointing the defendants to be the executors and trustees thereof and making a bequest of chattels to his wife for life, bequeathed all his real and personal estate, including the goodwill and stock in trade of his business of a provision merchant, upon trust to carry on his business for so long a time as they should think fit, with liberty to use and employ for that purpose such part of his residuary estate as they might deem requisite. Subject as aforesaid the testator directed his trustees to sell and convert into money his real and personal estate and, after payment of his debts and funeral and testamentary expenses, to stand possessed of the residuary trust moneys upon trust to pay certain legacies and subject thereto upon trusts for his wife for life, with remainder to some of his sons and daughters, the daughters' shares being settled. And the testator empowered his trustees to postpone the sale and conversion of his real and personal estate for so long as they should think fit.

The testator died in August, 1895, leaving eight children, six of whom were infants. His personal estate was sworn at about 6400*l.* On the death of the testator the defendants, in the exercise of their discretion and at the urgent request of the testator's widow, decided to carry on the business, and employed as manager the testator's widow, who had for many years assisted him in the conduct of it. In December, 1905, the testator's widow died, and the defendants continued to carry on the testator's business for the benefit of the family.

In March, 1912, the plaintiffs, who were two of the married daughters of the testator and entitled respectively to a legacy of 500*l.* and a share of the residue, applied to the defendants for an account of the testator's estate and business, and in October, 1912, in consequence of delay in rendering the account, they issued against the defendants an originating summons claiming the usual accounts and inquiries of the testator's real and personal estate (including the business), and administration, if necessary. On the hearing of the summons in chambers on February 13, 1913, the defendants submitted to account and desired the fullest investigation, and the order directed the usual accounts and inquiries.

Under this order the defendants carried in voluminous accounts extending over seventeen years from the testator's death. After the vouching of the accounts had proceeded for some months before the Master, the defendants for the first time claimed that, in respect of all payments made by them on account or out of the testator's estate more than six years before the issue of the originating summons, they were entitled to relief by virtue of s. 8 of the Trustee Act, 1888, and that none of such payments ought to be disallowed. The Master reserved the question for the consideration of the Court, and by his certificate dated February 26, 1916, made alternative findings. He certified (inter alia) that the defendants had received personal estate of the testator (including the business) down to February 24, 1916, to the amount of 118,085*l.* 9*s.* 7*d.* and (subject to the question reserved for the Court) were entitled to be allowed on account thereof sums to the amount of 117,005*l.* 7*s.* 8*d.*, leaving a balance due from them of 1080*l.* 1*s.* 11*d.* on that account. He also certified that if the defendants were entitled to the relief they claimed under the statute, then they had received personal estate (including the business) down to February 24, 1916, to the amount of 118,085*l.* 9*s.* 7*d.* and were entitled to be allowed on account thereof sums to the amount of 121,897*l.* 12*s.* 2*d.*, leaving a balance due to them of 3812*l.* 2*s.* 7*d.*

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The Master by his certificate also made alternative findings in respect of the rents and profits of the testator's leasehold estates received by the defendants, from which it appeared that there was a balance due from them which would be considerably reduced if they were entitled to the relief they claimed under the statute. The action now came on for hearing on further consideration.

The items disallowed the defendants included payments made on account of the shares of the beneficiaries, overpayments made to the tenant for life on account of income, payments made at the request of some of the beneficiaries to or on behalf of a son of the testator who was not a beneficiary and had committed defalcations, and goods supplied by the business to the tenant for life and such of the beneficiaries as were living with her.

Ward Coldridge, K.C., and *H. J. H. Mackay*, for the plaintiffs, stated the facts.

Jenkins, K.C., and *Pattisson*, for the defendants. Under the testator's will the plaintiffs were beneficially entitled in possession to legacies and beneficially entitled in reversion to a share of his residuary estate. The defendants have not been guilty of any fraud, nor have they retained or converted to their own use any trust moneys. They have acted honestly and are entitled to the benefit of s. 8 of the Trustee Act, 1888 : *How* v. *Lord Winterton* (1) ; *In re Davies* (2) ; *In re Blow* (3) ; *Lacons* v. *Warmoll* (4) ; the form of the order in *How* v. *Lord Winterton* was settled by the Court of Appeal. (5) The statute began to run at the death of the testator's widow in December, 1905, and the six years ran out in December, 1911. Assuming the plaintiffs are entitled to an account from the first to see what the defendants have done with the estate, the defendants ought to be allowed all payments made more than six years before the date of the summons. The statute becomes relevant when they are asked to pay, and they are not barred from that defence merely because they submitted to account in chambers. There is no case that decides that on an originating summons the defence of the statute must be raised at the time the order for account is

(1) [1896] 2 Ch. 626.
(2) [1898] 2 Ch. 142.
(3) [1914] 1 Ch. 233, 242.
(4) [1907] 2 K. B. 350, 364.
(5) (1898) 79 L. T. 344 (*a*).

made, and it is submitted that the proper time to raise it is when the account is before the Master or at the hearing on further consideration. A trustee is not bound specially to plead the Judicial Trustee Act, and can avail himself of it when the action comes on for trial: *Singlehurst* v. *Tapscott Steamship Co.* (1); and it is submitted that the analogy of that Act applies: Wolstenholme's Conveyancing and Settled Land Acts, 10th ed. p. 243.

Rowland Rowlands and *Tyldesley Jones*, for beneficiaries having liberty to attend the proceedings.

Ward Coldridge, K.C., and *H. J. H. Mackay*, for the plaintiffs, were not called upon.

NEVILLE J. As at present advised I am of opinion that this is a case in which s. 8 (*b*) of the Trustee Act, 1888, if properly raised, would have been applicable for the benefit of the defendants. But the question is whether it has been adequately raised and at the proper time. The proceedings were commenced by originating summons and the usual accounts and inquiries were directed, the Master has made his certificate, and the matter is now before the Court on further consideration. The accounts directed by the order and carried in by the trustees went back to the year 1895. Having regard to the form of the order, every one of the accounts directed is inconsistent with the limitation of the liability of the trustees to six years before the issue of the summons. The accounts were before the Master for three years, and at some time during that period the point was raised for the first time on behalf of the trustees that they should be allowed the benefit of the statute, and what I have to consider is a very serious question indeed, namely, whether the statute can be relied on and set up by trustees after an order for accounts inconsistent with it has been made. Here the trustees never suggested they were not liable to account from the testator's death until the accounts were being taken. It seems to me that if I now allow this defence an immense amount of time and money will have been thrown away. In every case that has been cited the point has been taken at the trial or when the order was made. It appears to me the account must depend on the form of the order at the time it is made. The order can be qualified by a reference

(1) [1899] W. N. 133.

to the statute, or, as pointed out by Cozens-Hardy M.R. in *In re Blow* (1), a full account can be directed to be taken, the question as to s. 8 being reserved until further consideration. But in such a case I cannot see any advantage in postponing the question of the liability of the trustees to further consideration. In the present case the accounts are complete, and, the question of the statute not having been raised until the accounts had been some time before the Master, the defendants cannot, in my opinion, now set up the defence of the statute.

Solicitors: *Fullilove, Arnott & Co.; J. B. Somerville, for Brodie & Walton, Llanelly.*

H. L. F.

SARGANT J.
1916
March 6, 7.

In re ROBERTS.
ROBERTS *v.* MORGAN.

[1915 R. 20.]

Will—Construction—Gift to Tenant for Life—Remainder as to Specific Properties to Testator's Children—Gift over if Child should "die without leaving legal issue"—Period of Division.

Testator, who died in 1877, by his will gave his widow an estate for life in all his real and personal property. After her death he divided his property amongst his four children as follows: To his one son he gave a freehold tenement and "100*l.* in money"; to trustees he gave a mortgage for 1000*l.* on other real estate for the use and benefit of one of his daughters; and to the same trustees he gave other real estate in trust for his two other daughters as tenants in common. Then he declared that "if any of my said daughters or son die without leaving legal issue, her, their, or his share shall be divided equally between the survivor or survivors of him or her or them so dying without leaving legal issue, share and share alike, as tenants in common and not as joint tenants." All the four children survived the widow, and afterwards two of them died leaving issue, and the other two died without leaving issue:—

Held, that the gift over or divesting was only to take effect if a child of the testator died without leaving legal issue in the lifetime of the testator's widow.

O'Mahoney v. *Burdett* (1874) L. R. 7 H. L. 388 distinguished.

JOHN ROBERTS, of Pensarn, in the parish of Llannor and county of Carnarvon, gentleman, whose property principally consisted of farms, by his will gave to his wife, Jane Roberts, all his property, estate, and effects, whether real or personal, for her own use and benefit during her life. After her death he divided his property amongst his four children as follows: He devised to his son John his tenement called "Tanterfyn," in the parish of Llangeinwen and county of Anglesey, and "100*l.* in money"; he gave to John Edwards and Griffith Roberts and to the survivor of them 1000*l.* secured on mortgages of certain land and buildings called "Tan-y-bryn," in the parish of Dolbenmaen and county of Carnarvon, in trust for the use and benefit of his daughter Jane; and he devised to the same trustees and the survivor of them a corn mill, land, house, and garden in the parish of Llandwrog and county of Carnarvon, in trust for his daughters Ellen and Anne, share and share alike, as tenants in common and not as joint tenants. The will then proceeded as follows: "And it is my will that, if any of my said daughters or son die without leaving legal issue, her, their, or his share shall be divided equally between the survivor or survivors of him or her or them so dying without leaving legal issue, share and share alike, as tenants in common and not as joint tenants." The testator appointed his wife sole executrix, and died on February 25, 1877, his will being proved by her in April, 1877. She died on February 9, 1894.

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(1) [1914] 1 Ch. 233, 243.

John Roberts, the son, died on May 2, 1904, leaving John Howell Roberts his only child and heir-at-law.

Anne Roberts married the Rev. John Morgan in 1870, and died on June 22, 1906, intestate, leaving Henry John Morgan her only son and heir-at-law.

Ellen Roberts died on August 9, 1907, a spinster, having by her will given all her lands and effects to her sister Jane Jones Roberts for life, and after her decease, having given to her nephew Henry John Morgan and his heirs all her real estate in the parish of Llandwrog or elsewhere, and appointed Jane Jones Roberts executrix during her life, and afterwards John Morgan and Henry John Morgan her executors, and the two Morgans proved the will on February 11, 1908.

Jane Jones Roberts, the other daughter, died on February 7, 1908, having by her will given all her lands and other property to Ellen Roberts for life, and then given the property called "Tan-y-bryn" to her nephew John Howell Roberts for life, and after his decease to such son or daughter of her said nephew as he might by will or deed appoint, and in default of appointment to certain of his children. And, after bequeathing some furniture and stock to her sister Anne Morgan, the testatrix gave all the residue of her property to her brother-in-law John Morgan and her nephew Henry John Morgan upon certain trusts in favour of the plaintiff for life, and after his death for his children. The Rev. John Morgan and Henry John Morgan proved her will on June 6, 1908.

On the death of Ellen Roberts, Jane Jones Roberts, as tenant for life under her will, went into receipt of the rents and profits of the undivided moiety of the property in the parish of Llandwrog devised by John Roberts, the testator, in trust for Ellen Roberts, and after the death of Jane Jones Roberts, Henry John Roberts, on the assumption that Ellen Roberts had power to dispose of that moiety, went into receipt of the rents and profits of the same moiety as devisee under her will. He was also in receipt of the rents and profits of the other moiety.

John Howell Roberts brought the present action against Henry John Morgan and Griffith Roberts (surviving trustee of the gifts to daughters under the original testator's will), alleging that the defendant Morgan had refused to account for one moiety or any part of the rents and profits of the Llandwrog property from February 7, 1908, and claiming a declaration (with incidental relief) that under the will of John Roberts, and in the event that had happened of Jane Jones Roberts having been the only survivor of the brother and sisters of the said Ellen Roberts living at Ellen's death without issue, and under the will of Jane Jones Roberts, the plaintiff became entitled on the death of Jane to receive during his life one moiety of the rents and profits of the Llandwrog property.

The action now came on for trial.

Romer, K.C., and *H. C. Bischoff*, for the plaintiff. On the death of John Roberts, the son, his three sisters survived. On the death intestate of Anne, who was entitled to one moiety of the Llandwrog property, that moiety went to the defendant Henry John Morgan, as her son and heir. Ellen Roberts was never married, and, as she "died without leaving legal issue" within the meaning of the original testator's will, her moiety of the Llandwrog property went on her death to Jane Jones Roberts, and passed by her will (Ellen Roberts having predeceased her) to the plaintiff for life. The question is whether the gift over in the case of a child dying without issue is to be construed as limited to the event of the child dying without issue in the lifetime of Jane Roberts, the testator's widow, or whether it is a gift over which takes effect if a son or daughter dies at any time without leaving issue. We say that the latter construction is the right one, and that the case is governed by *O'Mahoney* v. *Burdett.* (1) [They also referred to *In re Pickworth* (2) and *In re Deacon's Trusts* (3); and distinguished *Besant* v. *Cox.* (4)]

Martelli, K.C., and *G. E. Cruickshank*, for the defendant H. J. Morgan. The direction in John Roberts's will that, if any of his daughters or son should die without leaving legal issue, her, their, or his share should be divided equally between the survivor or survivors of him, her, or them so dying, is restricted to death without leaving legal issue during the life of the testator's widow, and, if this is the right construction, Ellen Roberts became indefeasibly entitled for an estate in fee simple to the one equal undivided moiety in the Llandwrog property devised to her by her father's will, and H. J. Morgan took this moiety under her will. If the plaintiff's construction were adopted, the gift of the 100*l.* in money to John Roberts would be cut down to a gift of that sum to be invested, only the income of it being taken by John Roberts for life, which would be absurd. Then if the will were to be read as giving over each share as the first taker of it dies, the result would be that there would be no provision for what was to occur on the death of the last of the four children if he or she had no lawful issue. The case is outside *O'Mahoney* v. *Burdett* (1), and is governed by *Olivant* v. *Wright* (5) and *Besant* v. *Cox* (4), in both of which cases *O'Mahoney* v. *Burdett* (1) was distinguished. [They also referred to *Hordern* v. *Hordern* (6); *Clark* v. *Henry* (7); *Cripps* v. *Wolcott* (8); *In re Anstice* (9); Jarman on Wills, 6th ed. p. 2167; and Vaughan Hawkins on Wills, 1st ed. pp. 260, 266.]

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(1) L. R. 7 H. L. 388.

(2) [1899] 1 Ch. 642.

(3) (1906) 95 L. T. 701.

(4) (1877) 6 Ch. D. 604.

(5) (1875) 1 Ch. D. 346.

(6) [1909] A. C. 210.

(7) (1870) L. R. 11 Eq. 222; (1871) L. R. 6 Ch. 588.

(8) (1819) 4 Madd. 11.

(9) (1856) 23 Beav. 135.

Romer, K.C., in reply. *Olivant* v. *Wright* (1) and *Besant* v. *Cox* (2) are cases of extraordinarily worded wills. If the will in *Hordern* v. *Hordern* (3) is correctly stated in the report, there was good reason for the Judicial Committee deciding as it did. [He also referred to Theobald on Wills, 7th ed. pp. 681, 683; *Crowder* v. *Stone* (4); and *Bright* v. *Rowe.* (5)]

Meyrick Beebee, for the defendant Griffith Roberts, submitted to abide by the direction of the Court.

SARGANT J. In this action there is a preliminary point of construction which both parties are agreed I ought to decide before I deal with the rest of the action. The point is whether under a gift over in the event of a beneficiary dying without issue I am to construe that gift over as limited to a period other than the life of the first taker, namely, limited to the event of the child dying without issue in the lifetime of the parent, or whether I am to read it as extending to the whole life of the first taker. There can be no question whatever that, prima facie, and in the absence of context to the contrary, the latter is the construction that I ought to put upon the will. That has been definitely settled by *O'Mahoney* v. *Burdett.* (6) But what is put forward by Mr. Martelli is that there is here such a context as to indicate sufficiently that the testator was referring to an earlier period, that is to say, the event of death without issue in the lifetime of the first tenant for life.

Now the will is one of John Roberts (who was a farmer, or country gentleman—at any rate, some one used to property), and his property consisted of farms. By his will he gave his wife a life interest in all his property, and then from and after her decease he divided his property amongst his four children in the following way. He gave a property called "Tanterfyn" and 100*l.* in money to his son John; he gave 1000*l.* secured by way of mortgage on a property called "Tan-y-bryn" to his daughter Jane; and he gave another property situate in the parish of Llandwrog between his daughters Ellen and Anne. In every case the first gift of the property was absolute, although in the case of the three daughters there was the interposition of trustees. I think counsel on both sides agree that no stress is to be laid upon that interposition because the trust was not one to pay, but was an absolute trust in the first instance, and probably the testator thought that in the case of a married woman trustees were desirable. It may be a question whether the interposition of the trustees, having regard to the Statute of Wills and the Statute of Uses, did in fact prevent the legal estate from vesting in the daughters respectively; but I think that is of little importance, because what I have to find is the general intention of the testator. After having thus divided his property amongst his four children he inserts a clause which gives rise to the whole of the difficulty. [His Lordship read the last clause of the will above stated, and continued:] The language of that clause is obviously in many respects very inartificial and clumsy. I rather think that the words "of him, or her, or them so dying" are to be read as governed by the words "survivor or survivors," so that the direction is that the share or shares of those who die without leaving legal issue shall be divided amongst those who survive those dying without leaving legal issue; but it may be that the words "so dying without leaving legal issue" are a sort of vain repetition, and that the intention of the testator was to divide amongst the survivor or survivors, simply, of him or her or them.

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(1) 1 Ch. D. 346.
(2) 6 Ch. D. 604.
(3) [1909] A. C. 210.
(4) (1829) 3 Russ. 217.
(5) (1834) 3 My. & K. 316.
(6) L. R. 7 H. L. 388.

In that state of things it seems to me that there are a great many indications tending to show that the testator was contemplating a division as at the date of the death of his wife. In the first place, although he does not in terms use the word "divide" or "distribute" or any equivalent word, it is quite clear that he is in fact splitting up his property by way of specific gift amongst the members of his family—splitting up that which down to the death of his wife was to be an entire property into a number of independent separate gifts. Again, the gift to the son of "100*l.* in money," although, no doubt, it would be cut down to a life interest if the ultimate gift over should be construed in the way in which Mr. Romer invites me to construe it, appears to me, prima facie at any rate, to indicate an out and out handing over to the son of the money, particularly when one has regard to the very small amount of it. So far as the money is concerned, it would seem odd if the 100*l.* was to be retained by the trustees and invested. Then, beyond that, I think that the general effect of the words "that, if any of my said daughters or son die

SARGANT J. 1916 ROBERTS, *In re.* ROBERTS *v.* MORGAN.

without leaving legal issue, her, their, or his share shall be divided equally" point in the direction of there being, in some events, a possibility at least of more than one share being divided at the same time amongst persons surviving the same event. Now this is a state of things which would obviously arise if one were to give effect to this gift over as on the death of the widow, since it might very well be that more than one of her children would have died in her lifetime. But it would hardly occur if the period of the gift over was the death of each of the children, since it is in the highest degree improbable, if not actually impossible, that two of the children should die at the same moment of time. Further there is this, that if the will is to be construed as giving over each share as the first taker of that share dies, the settlement that is produced by the will is one that not only has disadvantages in it, but would result in making no provision for what was to occur on the death of the last of the four children if that child did not happen to leave any lawful issue, because there would necessarily be, in that event and on that death, no survivor at all. Moreover, it would make no provision for the way in which accrued shares should go. The accrued shares on the death of the second of the children who died without issue would not be caught up and given together with their original shares. There is nothing like a comprehensive workmanlike settlement on that view of the will.

But, beyond and in addition to all these considerations, it seems to me that I ought to have regard to what the Court of Appeal had regard to in *Olivant* v. *Wright* (1) and to what Malins V.-C. had regard to in *Besant* v. *Cox* (2), namely, that the result produced by the construction contended for by Mr. Romer would be one of the most inconvenient possible character, as being one which would leave each child in complete uncertainty, or partial uncertainty at any rate, during the whole of his or her life as to the way in which his property was to go. But that is only one phase of the general rule, that the Court, particularly in cases with regard to real estate, leans in favour of vesting at an early period rather than at a later period, and, I think, leans also, not merely to vesting, but to putting an end to the divesting clause at an earlier period rather than at a later period —that is to say, leans to a construction which will give an indefeasible vesting earlier rather than later. Of course, I do not want in any way to infringe on the general rule laid down in *O'Mahoney* v. *Burdett* (1); but it is to be observed that in that case the gift was of one sum only to one person, with a gift over to that one person, and there was no question of dividing up or anything of that kind, and there was no such context there as is to be found here. Here the will is one as to the construction of which I find very great difficulty, but on the whole I think I ought to come to the conclusion that this gift over did not extend to any event occurring after the lifetime of the tenant for life; that on her death the shares which the children were to take were to be ascertained once for all; and that from that time the shares were to be the indefeasible property of the respective children, and I so declare.

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(1) 1 Ch. D. 346.

(2) 6 Ch. D. 604.

Solicitors for plaintiff: *Huntley & Son, for Henry Charles Davies, Penygroes.*

Solicitors for defendant Morgan: *Ullithorne, Currey & Co., for John Stewart Laurie, Llangefni.*

Solicitors for defendant Roberts: *Billing & Co., for Morris Owen & Trevor Roberts, Carnarvon.*

F. E.

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(1) L. R. 7 H. L. 388.

BIBL. LONDIN UNIV.

Applied. Re DAVIES (*decd.*). [1950] 1 All E.R. 120.

SARGANT J.

1916

March 13.

In re STANLEY'S SETTLEMENT.

MADDOCKS *v.* ANDREWS.

[1914 S. 2367.]

Deed—Construction—Estate for Life by Implication.

In 1860 S. by deed settled leasehold property of his own in trust for his daughters M. and R. "for and during the terms of their natural lives as tenants in common and not as joint tenants" and "from and immediately after the decease of the survivor of them . . . . then to the use of their [*sic*] respective child or children of the said M. and R. share and share alike as tenants in common and not as joint tenants."

M. died in 1867 leaving children. R. died in 1914 without having had a child:—

Held that, on the death of M., R. took a life estate by implication in the moiety of M., and that on the death of R. the children of M. took the whole of the settled property.

By an indenture of settlement dated May 29, 1860, and made between William Stanley of the first part, Morgan Morgans and Annie Lexley, his wife, and William Rees and Mary Jane, his wife, of the second part, and Robert Stanley and James Stanley (trustees) of the third part, William Stanley (in consideration of the natural love and affection which he had unto his daughters, Annie L. Morgans and Mary J. Rees, and of 10*s*. paid to him by the trustees) assigned to the trustees, their executors, administrators, and assigns, six leasehold houses (therein recited to be subject to a mortgage) for the residue of a term of 999 years, upon trust to "receive and take the rents, issues, and profits thereof," "and, after deducting the ground rent, interest, and other outgoings, to pay the balance half-yearly," in June and December in each year, "into the proper hands and for the sole use and benefit of the said Annie Lexley Morgans and Mary Jane Rees for and during the terms of their natural lives as tenants in common and not as joint tenants, separately and apart from their respective husbands, the said Morgan Morgans and William Rees," and so that "the same or any part thereof" might not be within their control or subject to their debts, contracts, or engagements. And it was thereby declared that the receipts of Mrs. Morgans and Mrs. Rees "for all or any of the rents, profits and benefits of the said moneys, hereditaments and premises, or any part thereof," should from time to time, notwithstanding their coverture, be a good and sufficient release and discharge for the money which should be then due, payable, and expressed to be received. "And upon further trust that from and immediately after the decease of the survivor of them, the said Annie Lexley Morgans and M. J. Rees (whether in the lifetime of their husbands or not), then to the use of their [*sic*] respective child or children of the said Annie Lexley Morgans and Mary Jane Rees, share and share alike, as tenants in common and not as joint tenants."

Annie Lexley Morgans died on August 17, 1867, leaving four children, Annie Maddocks, William H. S. Morgans, Agnes Taylor, and another son (who died in 1899 leaving two children, and whose legal personal representative was a Mrs. Andrews). Mary Jane Rees died on February 14, 1914, without having had any children.

The three surviving children of Mrs. Morgans took out an originating summons against Mrs. Andrews, and against the legal personal representative of the last surviving trustee of the settlement, some of the next of kin of the settlor, and Clara L. Jacobs-Smith, one of the next of kin of Mrs. Rees and also of the settlor, raising the questions (1.) whether Mrs. Rees, as the survivor of the two tenants for life, was entitled during the remainder of her life to the whole of the net income of the settled property (or to some and what part thereof), and if not entitled to the whole net income, to whom and in what proportions what she was not entitled to belonged; and (2.) whether the whole of the settled property belonged beneficially to the plaintiffs, as three of the children of Mrs. Morgans, and Mrs. Andrews, as representative of the deceased child, in equal shares, or whether a moiety or some other and what portion thereof reverted to the settlor and passed on his death, a widower and intestate, to his next of kin.

A. L. Morris, for the plaintiffs. On Mrs. Morgans' death her moiety of the income was undisposed of by the settlement and therefore resulted to the settlor. The gift of life interests is to the two ladies "not as joint tenants," and these words prevent the application of the cases as to an implication of a life interest to the survivor. As regards the corpus, on the death of the survivor,

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1916
STANLEY'S SETTLEMENT, *In re.*
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Mrs. Rees, the corpus passed to the children of the two per capita, and as Mrs. Rees had no issue the four children of Mrs. Morgans are entitled. This would be clear but for the word "respective"; and that word may have been inserted to negative the suggestion that the children of Mrs. Morgans were to share with Mrs. Rees herself. In any case, the word is not sufficient to rebut the plain meaning of the gift. [He referred to *In re Hutchinson's Trusts* (1) and to Theobald on Wills, 7th ed. p. 303.]

A. Adams, for Mrs. Andrews. I adopt the plaintiffs' argument. It must also be borne in mind that the document to be now construed is not a will but a deed, and under this deed Mrs. Rees could not take a life estate by implication. In Norton on Deeds, p. 373, it is stated (citing Preston on Estates, vol. i. p. 190) that "By the rules of the common law applicable to deeds, no intention will be presumed unless it is expressed: and consequently no estate will arise unless there be a limitation to pass that estate." And at p. 377 of the same book there are the following passages: "No estate or trust can arise by implication of law, and no estate or trust by way of resulting use or trust can arise in favour of a person who was not the owner of the property conveyed by the deed." "Cross-remainders cannot be implied in a deed; an express declaration of intention is ineffective without apt words of limitation." Where there was no direction in a settlement how, in the event (which happened) of the death of the husband before the wife, the income was to be paid during the remainder of her lifetime, North J. in *Mara* v. *Browne* (2) said that the instrument, being a deed, must be "construed according to its tenor," and he declined to hold that she took a life estate. In *Tunstall* v. *Trappes* (3), to which North J. refers, the words "for her separate use during coverture" were, as he says, "not intended to cut down the life interest," but inserted "merely to amount to a parenthetical indication how that interest was to be enjoyed during the coverture." So there the life interest was not implied. Where a settlement gave an interest to the issue of the marriage in the event of the husband surviving the wife, but none in the contrary event, it was held that the issue could not, on the latter event, take by implication or construction: *Pringle* v.

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(1) (1882) 21 Ch. D. 811.
(2) [1895] 2 Ch. 69.
(3) (1830) 3 Sim. 286.

Pringle. (1) In *Allin* v. *Crawshay* (2) it was held that a wife took a life interest by implication, but the point was clearly not argued. If the Court is against me on this point, I say that the words are sufficient to prevent a life estate being implied.

[SARGANT J. referred to *Pearce* v. *Edmeades.* (3)]

Dighton Pollock, for one of the next of kin of the settlor. Mrs. Rees took no life interest in the share of Mrs. Morgans on the death of the latter. The provision that the sisters are to take the life interest as tenants in common and not as joint tenants conveys the idea of separation of their interests, which is furthered by the use of the word "respective" in subsequent parts of the will. And Mrs. Rees never took any part of the corpus. On her death without children it did not go to Mrs. Morgans' children, but there was a resulting trust of one half of it for the settlor. [He referred to *In re Browne's Will Trusts* (4) and *In re Hobson.* (5)]

Roope Reeve, for the defendant Clara L. Jacobs-Smith. Mrs. Rees took a life estate in Mrs. Morgans' share on the latter's death. The corpus of her own share, on her death without children, went back to the settlor.

SARGANT J. (after stating the questions raised by the summons). The settlement which I am asked to construe is a badly drawn document. The settlor thereby assigned certain leasehold property to trustees, upon trust, after paying the outgoings, to pay the balance of the income thereof to his two daughters, Mrs. Morgans and Mrs. Rees, for their natural lives "as tenants in common and not as joint tenants." Then the settlement says, "And upon further trust that from and immediately after the decease of the survivor of them, the said Annie Lexley Morgans and Mary Jane Rees (whether in the lifetime of their husbands or not), then to the use of their respective child or children of the said Annie Lexley Morgans and Mary Jane Rees, share and share alike, as tenants in common and not as joint tenants."

As regards the first question raised by the summons, Mr. Morris has contended that on Mrs. Morgans' death there was no survivor-

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(1) (1856) 22 Beav. 631.
(2) (1851) 9 Hare, 382.
(3) (1838) 3 Y. &. C. Ex. 246.
(4) [1915] 1 Ch. 690.
(5) [1912] 1 Ch. 626.

SARGANT J. ship of her interest for life to Mrs. Rees, and on the second question he says that on Mrs. Rees' death the surviving children of Mrs. Morgans—who are the plaintiffs in these proceedings—and the legal personal representative of her deceased child became entitled to the whole of the property.

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Mr. Adams, for Mrs. Andrews, the legal personal representative of the child, in arguing in the same interest, has attempted to support the general proposition that in a deed there cannot be an estate by implication of law. In Fearne on Contingent Remainders, 10th ed. vol. i. p. 49, there is the statement that "No estate for life can arise by implication, or by way of resulting use, to a person who was not the owner of the estate granted"; and Mr. Norton, in his work on Deeds, referring to this passage, says at p. 377: "No estate or trust can arise by implication of law, and no estate or trust by way of resulting use or trust can arise in favour of a person who was not the owner of the property conveyed by the deed."

I doubt whether an estate arising by implication from the particular language of a deed would be an estate arising by implication of law at all; but, assuming that it would, I have not been referred to any authority to the wide effect of the proposition advanced by Mr. Adams. *Tunstall* v. *Trappes* (1) is one authority against the proposition. There, under the trusts of a settlement, the interest of a fund was to be paid to Mrs. Tunstall "for her separate use during her coverture with William Tunstall," and, in case she should die in his lifetime, it was to be paid to him for life, and after the death of the survivor the principal was to be held in trust for the issue then living as Mrs. Tunstall should appoint, in trust for such issue equally. In that case it was held that Mrs. Tunstall was entitled to the interest, not only during the coverture, but for her life.

Further, *Allin* v. *Crawshay* (2) is an authority which appears to me to be dead in the teeth of the general proposition advanced by Mr. Adams. He says that the point was never argued in that case. That is true, but nevertheless the case is of great value. Originally Turner V.-C. thought that the wife took a life estate by implication under a deed, but declined to decide the point in the absence of the settlor's personal representatives. Afterwards they appeared and declined to argue the question—as no doubt their counsel thought it was too clear for argument—and thereupon the Vice-Chancellor held that the wife took a life estate.

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(1) 3 Sim. 286.

(2) 9 Hare, 382.

In *Mara* v. *Browne* (1) again the decision of North J. was against Mr. Adams' contention, for there North J. was evidently unaware of the existence of any such proposition as that now advanced. He says: "The instrument in question is a deed, and it must be construed according to its tenor, and I cannot find anything within the four corners of the instrument from which I can gather that the settlement was intended to give her the income during that period"—namely, the remainder of the wife's lifetime after her husband's death. After referring to *Tunstall* v. *Trappes* (2) North J. held that there was not enough in the deed to justify his finding a life estate by implication, but he obviously looked into the deed to see whether its terms enabled him to do so.

Then is there enough in the deed before me from which to imply a life interest to Mrs. Rees? Mrs. Morgans had four children and died many years ago. Mrs. Rees never had any child and died in 1914. In my opinion it is right to hold that Mrs. Rees took a life interest in her sister's share on that sister's death—not on the ground that there was a joint tenancy, because that is expressly excluded, but following the rule of construction laid down on the other and as I think better view of the principle on which in *Armstrong* v. *Eldridge* (3), *Pearce* v. *Edmeades* (4), and *In re Richerson* (5) were decided, namely, that a life interest is to be implied in favour of the survivor of the tenants in common. It is better to say that they are tenants in common for life with a life interest in remainder to the survivor. The words "the same or any part thereof" may be held to point definitely to the times when two are receiving the income, and, subsequently, when one only is receiving it. It is sufficient to say that there is enough on the will to enable me to hold that each sister took a life estate in remainder in the other sister's share on that sister's death.

As regards the second question, is the gift in remainder of the corpus to the child or children of one sister in that sister's share only, or is it a gift in remainder of the whole corpus to all the children of both sisters as one class? The fact that the corpus is given over at one time, namely, the death of the surviving sister, strongly favours the view that the gift is to the children as one class. There is nothing to point to the intention that one moiety is to go only to the children of the tenant for life of that moiety except the word "respective," and that is not enough of itself to have the required effect. The words "as tenants in common" point to a gift to the whole class of children of either sister on the death of the surviving sister.

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(1) [1895] 2 Ch. 69, 81.
(2) 3 Sim. 286.
(3) (1791) 3 Bro. C. C. 215.
(4) 3 Y. & C. Ex. 246.
(5) [1893] 3 Ch. 146.

Many cases were reviewed by Kay J. in *In re Hutchinson's Trusts* (1), but in that case there were absolute gifts to persons which were held to be cut down only in favour of their children if they had any.

In the present case I hold that the children of the one who left children are entitled to the whole property, and that there is no resulting trust in favour of the settlor.

Solicitors: *Burton, Yeates & Hart, for G. F. Willett, Cardiff, and for Morgan Davies, Pontardawe; Bell, Brodrick & Gray, for C. & W. Kenshole & Prosser, Aberdare.*

(1) 21 Ch. D. 811.

F. E.

MacCONNELL *v.* E. PRILL & CO., LIMITED.

SARGANT J.

1916

May 5, 11.

[1916 M. 660.]

Company—Extraordinary Resolution—Notice of Meeting—Increase of Capital—Specifying amount of proposed Increase—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 69; *Sched. I., Table A, clauses* 41, 49, 50.

Although, as decided in *In re Penarth Pontoon Slipway and Ship-Repairing Co.* [1911] W. N. 240, the notice of the first meeting to pass a special resolution need not state that the resolution proposed to be passed at that meeting is to be an extraordinary resolution, where an extraordinary resolution is proposed to be passed the notice of the general meeting must comply with s. 69 of the Companies (Consolidation) Act, 1908, by "specifying the intention to propose the resolution as an extraordinary resolution."

As regards the whole subject of an "extraordinary resolution," the Act of 1908 differs materially from the Companies Act, 1862, and its definition of that term is general; and, having regard to the plain words of its enactments in this respect, those enactments must, according to the principles laid down by Lord Herschell in *Bank of England* v. *Vagliano Brothers* [1891] A. C. 107, 144, 145, although forming part of a consolidation statute, be construed apart from the provisions of the Act of 1862 for which they are substituted and the decisions thereon.

Notice of a meeting of a company to increase or sanction the increase of the share capital of a company is not sufficient if it merely refers generally to a proposed resolution to increase the share capital; it must show an intention to make the specific increase embodied in the resolution that is actually passed. Observations on clauses 41 and 49 of the Table A scheduled to the Act of 1908.

The defendant company was incorporated on July 22, 1911, under the Companies (Consolidation) Act, 1908, as a company limited by shares, and with a nominal share capital of 1000*l.* in 1*l.* shares, which was afterwards increased to 2000*l.* divided into 2000 like shares. Clause 1 of the articles of association provided that "except so far as the same are hereinafter expressly excluded and except so far as the same shall be inconsistent with these articles, the regulations contained in Table A in the First Schedule to the Companies (Consolidation) Act, 1908 . . . . shall apply to the company." The following provisions of Table A were not included and therefore applied to the company: "41. The directors may, with the sanction of an extraordinary resolution of the company, increase the share capital by such sum, to be divided into shares of such amount, as the resolution shall prescribe." "49. Seven days' notice at the least . . . . specifying the place, the day, and the hour of meeting and, in case of special business, the general nature of that business shall be given in manner hereinafter mentioned . . . ." "50. All business shall be deemed special that is transacted at an extraordinary meeting." (1)

On February 17, 1916, the following notice, bearing that date, headed with the name and address of the company and signed by the secretary, who so described himself, was sent to the shareholders (the one which reached Mrs. Jessie MacConnell being addressed to her as "Dear Madam"):

"You are kindly requested to attend an extraordinary general meeting, to be held at the above address on Friday, February 25, 1916, at 12 noon.—Agenda: To pass resolution to increase capital of the company."

The resolution passed at the meeting, as an extraordinary one, was—"That the capital of the company be increased to 3500*l.* by the creation and issue of 1500 shares of 1*l.* each."

Mrs. MacConnell, in the present action (suing on behalf of herself and all other the shareholders of the defendant company except such as were defendants), moved for an interim injunction to restrain the defendants (the company and its directors) from acting on or carrying into effect the resolution passed at an extraordinary general meeting of the company, purporting to increase its capital.

Manning, for the plaintiff. The notice of the meeting was insufficient (1.) because it did not specify the resolution which was actually passed; and (2.) because it did not state the intention to pass the resolution as an extraordinary resolution, for an extraordinary resolution was required by clause 41 of the Table A of 1908. As regards the first objection, it seems obvious that the amount of the proposed increase of share capital and into what shares it was to be divided ought to have been stated in the notice, as these matters are by clause 41 of Table A required to be specified in the resolution sanctioning the increase. As to the second objection, s. 69, sub-s. 1, of the Act of 1908 expressly provides that the notice of the meeting at which an extraordinary resolution is to be proposed must be one "specifying the intention to propose the resolution as an extraordinary resolution," and here the notice is silent on that head. Even under the Act of 1862, it was held that under s. 129, sub-s. 3, the notice must give the shareholders to understand that it was proposed to pass an extraordinary resolution to wind up: *In re Bridport Old Brewery Co.* (1)

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(1) These provisions are identical with the provisions in clauses 41, 49, and 50 of the Table A which, in 1906, was substituted by the Board of Trade, while the Companies Act, 1862, was still unrepealed, for the Table A contained in the First Schedule to the Act of 1862.—F. E.

Bischoff, for the defendants. The notice is sufficient. It is expressed to be a notice of an extraordinary general meeting. Clause 50 of Table A, which has statutory authority, says that "all business shall be deemed special that is transacted at an extraordinary meeting," and clause 49 says that the notice of a meeting is to specify, "in case of special business, the general nature of that business." The statement in the notice here, that the proposed resolution is to increase the capital, sufficiently states the "general nature of the business."

Where a special resolution under s. 69 is to be passed, it is not necessary to state, in the notice of the first meeting, that the resolution is to be passed as an extraordinary resolution: *In re Penarth Pontoon Slipway and Ship-Repairing Co.* (2) The Act of 1908 is a consolidating statute, and regard must be had in construing it to the decisions on the Companies Act, 1862, which, among other Acts, it replaces. By s. 129 of the Companies Act, 1862, a company under that Act might be wound up voluntarily in certain events, one of which was "whenever the company has passed an extraordinary resolution to the effect that it has been proved to their satisfaction that the company cannot by reason of its liabilities continue its business, and that it is advisable to wind up the same." Then the section says that, "for the purposes of this Act, any resolution shall be deemed to be extraordinary which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution as hereinbefore defined." By s. 51 of the Act of 1862 a resolution is to be deemed special whenever it is passed by a three-fourths majority at a general meeting "of which notice specifying the intention to propose such resolution has been given, and such resolution has been confirmed" by a majority "at a subsequent general meeting of which notice has been duly given." There is nothing in these sections requiring any statement in the notice that the one meeting, or the first of the two meetings required for a special resolution, is to pass an extraordinary resolution. From *In re Silkstone Fall Colliery Co.* (1) it would seem that in a case under s. 129, sub-s. 3, of the Act of 1862 the notice was only required to express that it was intended to propose "a resolution that the company is unable by reason of its liabilities to continue its business"; and *Stone* v. *City and County Bank* (2) seems to be a decision to the same effect. By s. 51 of, and Sched. IV. to, the Companies Act, 1907, the part of s. 129 of the Act of 1862 defining an extraordinary resolution was repealed, and by s. 45 of the Act of 1907 "an extraordinary resolution for the purposes of the Companies Act, 1862, and this Act, means a resolution which is passed in such manner as would, if it had been confirmed by a subsequent meeting, have constituted a special resolution." This enactment, like the Act of 1862, was repealed by the Act of 1908, but it shows that on the eve of the consolidating Act there was no intention to provide that the notice of meeting should show that the proposed resolution was to be an extraordinary one. [He also referred to *Normandy* v. *Ind, Coope & Co.* (3)]

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(1) (1867) L. R. 2 Ch. 191, 194.

(2) [1911] W. N. 240.

Manning in reply. I rely on the words of s. 69 of the Act of 1908, which are so clear that they cannot be construed by the light of decisions on previous enactments containing different language.

Cur. adv. vult.

May 11. SARGANT J. (after stating the object of the motion). The only objection to the increase of capital that was insisted upon before me was that the notice of the meeting at which the increase was sanctioned was an insufficient notice. [His Lordship referred to the incorporation of the company and its nominal share capital, and read clause 41 of Table A to the Act of 1908, and continued :] This article is in the same terms as art. 41 of the revised Table A, which was, in the year 1906, substituted by the Board of Trade, under s. 71 of the Act of 1862, for the original Table A in the First Schedule to that Act. It differs from the article of the original Table A which deals with the same subject-matter, namely, art. 26, in this respect, that the sanction to an increase of capital has to be that of an extraordinary resolution, while the sanction required by art. 26 is that of a special resolution of the company. [His Lordship read the resolution passed at, and the notice of, the meeting, and continued :] This notice is said to be insufficient on two grounds, both depending on the language of s. 69 of the Act of 1908, which defines an extraordinary resolution. In the first place it is said that the notice convening the meeting did not specify *the* resolution, and in the next place it is said that the notice did not specify the intention to pass the resolution as an extraordinary resolution. In my opinion, both objections are well founded.

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(1) (1875) 1 Ch. D. 38.
(2) (1877) 3 C. P. D. 282.
(3) [1908] 1 Ch. 84.

As regards the first objection, it is obvious that the notice signifies merely an intention to propose some increase or other in the capital of the company, and not an intention to make the specific increase embodied in the resolution that was actually passed. It seems to me of great importance that shareholders should be protected in matters of this kind by specific notice of what is intended to be done. And there is a marked difference between the very definite language in this respect of s. 69 of the Act of 1908 and the much looser and general language of art. 49 in the Table A of that Act with regard to notice of any special business that is proposed to be transacted at a meeting of the company. In the latter case notice is required only of the general nature of any special business to be transacted, while in the case of an extraordinary resolution the notice has to specify the resolution.

As regards the second objection, nothing can be clearer than the very precise language of s. 69 of the Act of 1908, which requires, in the case of an extraordinary resolution, that the notice shall specify the intention to propose the resolution as an extraordinary resolution. So clear, indeed, is the language that it was at one time doubted, until the doubt was dispelled in *In re Penarth Pontoon*

Slipway and Ship-Repairing Co. (1), whether it had not become necessary, even for the validity of a special resolution under the Act of 1908, that the notice of the first meeting should contain words specifying the intention to pass the resolution at that first meeting as an extraordinary resolution. And in the case of an extraordinary resolution itself, the only reason suggested for doubting the necessity of inserting these words in the notice appears to arise from the decisions under s. 129, sub-s. 3, of the Companies Act, 1862, as to what notice was necessary for the purpose of passing an extraordinary resolution to wind up a company on the ground that the company could not, by reason of its liabilities, continue its business.

When, however, the decisions under that section—such as *In re Bridport Old Brewery Co.* (2), *In re Silkstone Fall Colliery Co.* (3), and *Stone* v. *City and County Bank* (4)—are looked at, it will be found that they turn, not on any express definition of the phrase "extraordinary resolution" in the Act of 1862, but merely on the question whether the notice that had been sent gave shareholders sufficient warning that it was intended to put the company into liquidation by a single extraordinary resolution under s. 129, sub-s. 3, of the Act rather than by the more normal process of a special resolution.

And further, as regards the whole subject of an extraordinary resolution, the present Act of 1908 differs materially from the Act of 1862. The definition in the Act of 1862 of the expression "extraordinary resolution" was not a general one, and was used merely for the purpose of defining the method of winding up a company summarily under s. 129, sub-s. 3. But in the present Act the definition of an "extraordinary resolution" in s. 69 is quite general (following in this respect s. 45 of the Companies Act, 1907), and extends to at least one new matter, namely, the provision in art. 41 of Table A, as redrawn in 1906, and enacted in the same terms in the Act of 1908, as to increasing the capital of a company. And it will be noticed also that, whereas the Act of 1862 first defined a special resolution and then defined an extraordinary resolution with reference to that first definition, the present Act first defines an extraordinary resolution and then defines a special resolution with reference to the definition of an extraordinary resolution.

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(1) [1911] W. N. 240.

(2) L. R. 2 Ch. 191.

(3) 1 Ch. D. 38.

(4) 3 C. P. D. 282.

No doubt the prima facie presumption in the case of a consolidating Act, such as the present Act of 1908, is that the Legislature intended to reproduce the existing position, and my first inclination would be to hold that, as under s. 129, sub-s. 3, of the 1862 Act, any notice is sufficient which sufficiently informs shareholders of the intention to act by way of extraordinary resolution. But this prima facie view must yield to plain words to the contrary. And when regard is had, not merely to the very specific language of s. 69 of the present Act, but to the extended operation thereby given to an extraordinary resolution and to the new method of defining it, I think it impossible to escape from the conclusion that the notice of the meeting must not merely indicate but actually specify the intention to pass the resolution as an extraordinary resolution: see the observations of Lord Herschell in *Bank of England* v. *Vagliano Brothers*. (1)

Accordingly, I grant an interlocutory injunction until the hearing of the action, in the terms of the notice of motion.

Solicitor for plaintiff: *A. E. Timbrell.*
Solicitor for defendants: *M. A. Jacobs.*

F. E.

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(1) [1891] A. C. 107, 144, 145.

YOUNGER J.

1916

March 22; *April* 5.

REES *v.* MARQUIS OF BUTE.

[1916 R. 288.]

DAVIES *v.* MARQUIS OF BUTE.

[1916 D. 306.]

Contract—Specific Performance—Cottage let at Yearly Rental of Less than 26*l.—Lease for Ninety-nine Years in Consideration of Premium and Annual Rent — Validity — Increase of Rent and Mortgage Interest (War Restrictions) Act,* 1915 (5 *&* 6 *Geo.* 5, *c.* 97), *s.* 1, *sub-ss.* 1 (iii.), 2; *s.* 2, *sub-s.* 2.

By s. 1, sub-s. 2, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, " A person shall not in consideration of the grant . . . . of a tenancy of any dwelling-house to which this Act applies require the payment of any fine, premium, ... in addition to the rent, and where any such payment has been made in respect of any such dwelling-house after the 25th day of November, 1915, then the amount shall be recoverable by the tenant by whom it was made from the landlord . . . ."

In January the defendant offered for sale by public auction certain cottage properties upon the terms that the purchaser of each cottage lot should have the right to have granted to him a lease thereof for ninety-nine years from February 22, 1916, at a nominal yearly rent varying from 15*s.* to 1*l.*, and according to a form of lease set forth in the particulars of sale. At the auction R. became the purchaser of one of the lots, a ninety-nine years' lease of a cottage, at the price or premium of 55*l.*, and at a rent of 1*l.* per annum; and D. became the purchaser of another lot, a similar lease of a cottage then in his own occupation, at the price or premium of 57*l.* 10*s.*, and at the same yearly rent. The cottages were put up for sale by the defendant in ignorance of the passing of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which received the Royal assent on December 23, 1915. On becoming aware of the passing of the Act the defendant declined to complete, and thereupon D. and R. commenced actions for specific performance of their contracts. No possession had been taken by either R. or D. under the contracts. It was clear that both the cottages were dwelling-houses to which the Act applied, and that the purchase-money, if paid, would be a " premium " within the meaning of s. 1, sub-s. 2, of the Act:—

Held, that notwithstanding that the term to be granted was ninety-nine years, the leases would create tenancies within the Act, and that the payments therefore of the sums for which R. and D. had purchased their cottages were premiums which the defendant was prohibited by s. 1, sub-s. 2, from retaining.

Held, also, that the agreements to pay the premiums being illegal, and no possession having been taken under the contracts by either R. or D., the defendant was entitled to be relieved altogether from the contracts upon repaying to R. and D. all moneys he had received under them.

ACTIONS.

On January 24 and 25, 1916, the defendant to these two actions offered for sale by public auction at the Boot Hotel, Aberdare, in 123 lots, 150 cottage properties situate at Abernant, Aberdare, upon the terms that the purchaser of each cottage lot should have the right to have granted to him a lease thereof for ninety-nine years from February 22, 1916, at a nominal yearly rent varying from 15*s*. to 1*l*., and according to a form of lease set forth in the particulars of sale. All the cottages were at the time of the auction let upon weekly tenancies at rentals amounting for a year to sums ranging from 5*l*. 17*s*. to 11*l*. 7*s*. 6*d*., and the object of the defendant was to afford to his then existing tenants, or others similarly placed, an opportunity to acquire in the respective cottage properties an interest in point of duration substantially equivalent to a freehold at a rent almost nominal, and on payment in each case of just that premium which the purchaser as the highest bidder at the auction might agree to pay.

Under the lease the lessee was to covenant to pay rates and taxes and to do repairs; these burdens under the existing tenancies were borne by the lessor.

At the auction the plaintiff John Rees was the highest bidder for and became the purchaser of lot 35, a ninety-nine years' lease of a cottage No. 10, Colliers' Row, Abernant, at the price or premium of 55*l*. and at a rent of 1*l*. per annum, and the plaintiff William Davies became the purchaser of lot 44, a similar lease of the cottage No. 19, Colliers' Row, aforesaid, for the price or premium of 57*l*. 10*s*. and at the same yearly rent. The plaintiff Rees paid a deposit of 5*l*. 10*s*. and certain agreed fees amounting to 3*l*., and the plaintiff Davies a deposit of 5*l*. 15*s*. and fees of the same amount, upon the conclusion of the contract. The cottage bought by Rees was at that time let on a weekly tenancy at a rent amounting to 10*l*. 14*s*. 6*d*. per annum, and the cottage bought by Davies was occupied by himself on a similar tenancy at a rent amounting to 9*l*. 8*s*. 6*d*. per annum. Except that the plaintiff Davies was in occupation of the cottage which he purchased, there was no relevant distinction between the claim against the defendant of the plaintiff Rees and that of the plaintiff Davies. In the view which the Court took of the Act it became unnecessary to deal with that distinction between the two cases.

The intention of the defendant to offer the premises at the auction sale was publicly advertised during the month of December, 1915, and the sales took place in ignorance of the passing of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which received the Royal assent on December 23, 1915. On becoming aware of the passing of the Act the defendant refused to complete the contracts until the opinion of the Court had been taken as to the effect of the Act upon these sales.

The plaintiffs Rees and Davies thereupon brought the present actions, which were treated as test cases, claiming (1.) specific performance of their respective contracts, and (2.) damages in addition or substitution.

The defendant by his defence in each case pleaded that he had always been ready and willing to perform and give effect to the agreement except so far as the Act had rendered it unlawful and impossible to give effect thereto, but that he was advised that by reason of the provisions of the Act and under the circumstances aforesaid he could not lawfully give effect to the agreement, and that the same had become by reason of the Act incapable of performance. Alternatively, in Davies' case, he pleaded that if a lease were to be granted in accordance with the terms of the agreement the effect thereof would differ so materially from what both parties had in contemplation that it would be inequitable for him to be required specifically to perform the same. He further stated that he was ready and willing to repay to the plaintiffs the sums paid by them.

At the hearing it was admitted that both cottages were dwelling-houses to which the Act applied, and that the purchase-money, if paid, would be a "fine, premium, or other like sum in addition to the rent" within the meaning of s. 1, sub-s. 2, of the Act.

The two actions were tried together.

The material sections of the Act are stated in the judgment of Younger J.

Alfred Adams, for the plaintiffs in both actions. It is submitted that the object of the Act was to prevent grasping landlords from raising rents above the amount of the "standard rent" fixed by the Act and that the provisions of s. 1, sub-s. 2, were intended to apply only to cases of short tenancies. The Act was never intended to apply to the case of the grant of a lease for a term of ninety-nine years in consideration of a premium and a small ground rent. The defendant would therefore incur no risk in granting the leases in question.

But if the Act does apply to cases like the present, the defendant must nevertheless carry out his contracts although the effect may be that under s. 1, sub-s. 2, he will not be entitled to retain the premiums paid to him. The Act does not avoid the contracts, but merely prevents the landlord from retaining the premiums paid in respect of the leases.

The Court ought not to impose on the plaintiffs as a condition of decreeing specific performance the obligation of paying the premiums which they could recover back the following day.

[YOUNGER J. I do not think it could ever have been the deliberate purpose of the Act that tenants should get their houses at less than the standard rent.]

J. G. Wood, for the defendant. When the auction sale was advertised in December, 1915, the defendant was requiring a premium as the consideration for the grant of the leases. That makes the contracts illegal. The Act starts ab initio and says that the bargain shall be only for rent. Where there is an illegal contract which the Court cannot enforce directly, it will not enforce it indirectly by giving damages, though the Court will, if money has been paid under it, direct its repayment: *Sykes* v. *Beadon*. (1) The Act makes no provision for apportioning the premium over the whole period of the term. If the Court were to direct specific performance of these contracts it would be imposing on the parties in each case a lease which was different in its terms from that contemplated by both parties at the auction sale.

Further, the illegality of a contract is a bar to its specific performance, as well as to every other proceeding by which either of the

(1) (1879) 11 Ch. D. 170, 197.

parties may seek to enforce it: Fry on Specific Performance, 5th ed. p. 241; *Atkinson* v. *Ritchie* (1); *Barker* v. *Hodgson*. (2)

Where the purchasing tenant is in occupation, as is the case of the plaintiff Davies, the transfer to him of the liability for rates, taxes, repairs, and insurance under s. 1, sub-s. 1 (iii.), is treated as an increase of rent, and that may involve applications to the county court to determine whether it is recoverable. This introduces a new term into the contract which neither party to it contemplated, and is such an alteration in the contract that it ought not to be enforced.

Alfred Adams in reply.

Cur. adv. vult.

April 5. YOUNGER J. read the following judgment, in which, after detailing the facts with regard to the sale of the two cottages and the terms on which they were then let as above set forth, he continued: It may here be stated that his contract is highly beneficial to each of the plaintiffs if the price agreed to be paid by him for his cottage and the obligations undertaken by him under the proposed lease are contrasted with the rent payable under the existing weekly tenancy. After making full allowance for the fact that under the weekly tenancy the rates and taxes in respect of the cottage are thrown upon the Marquis while under the lease they are to be borne by the lessee, it seems clear that if the premium be averaged over the whole lease the sum payable by the lessee for his house will be less per week than is being paid for it now, that is to say, less than the standard rent, to which reference will hereafter be made. The transaction, therefore, in each case is one which is entitled to every support and encouragement, and it is not surprising, and I was so informed at the hearing, that the action of the Marquis of Bute in making these 150 cottages available as a permanent investment for the war savings of their occupants, actual and prospective, had been greatly appreciated in South Wales. The cottages, however, were so put up for sale in ignorance of its possible application to them of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which received the Royal assent on December 23 last, and in these actions, which are, each of them,

(1) (1809) 10 East, 530, 534.

(2) (1814) 3 M. & S. 267.

an action by the plaintiff for specific performance of the contract to purchase a lease of his cottage on the terms just stated, the question at issue with the defendant is whether the Act has rendered it impossible for the defendant to receive or retain the purchase price or premium agreed to be paid for the lease in each case, and whether, even if he may not receive and retain it, the defendant is not bound to grant the lease in accordance with his contract so to do, to a purchaser released by the Act from his agreement to pay the premium. The plaintiffs are, each of them, quite willing to perform their contracts in accordance with their terms; they have no desire, except as a last resort, to adopt the extreme position just stated; the defendant, too, is anxious to fulfil his contract in each case.

It is said, however, that the Act referred to stands in the way of the desire of both parties, meritorious though it be, and the question whether that is the case or not is the question I have now to decide.

The Act in question is plainly an emergency Act designed to meet an exceptional crisis. It is intituled "An Act to restrict, in connection with the present war, the increase of the rent of small dwelling-houses and the increase of the rate of interest on, and the calling in of, securities on such dwelling-houses," and it is to remain in force during the continuance of the war and for a period of six months thereafter and no longer. The Act is doubtless specially intended to meet difficulties occasioned in munition districts by the large influx of population into these areas which has taken place and by the difficulty or impossibility of making adequate housing provision for the new comers in war time. But the Act is not limited to such areas; it applies to the whole of England, Scotland, and Ireland; it applies, however, only to what are called in the Act small dwelling-houses, and these in s. 2, sub-s. 2, are defined to be dwelling-houses of which it can be said, in the case of a house situate in the metropolitan police area, that either the annual amount of the standard rent as defined in the Act or the rateable value of the house does not exceed 35*l.*; in the case of a house situate in Scotland, 30*l.*; and in the case of a house situate elsewhere, 26*l.* The Act in effect makes irrecoverable after the date fixed for its commencement any increase in the rent of a dwelling-house to which it applies, or in the rate of interest on a mortgage to which it applies, over the standard rent or the standard rate of interest as defined in the Act. Now, "standard rent" is defined in s. 2, sub-s. 1 (*a*), as follows: "The expression 'standard rent' means the rent at which the dwelling-house was let on the 3rd day of August, 1914, or, where the dwelling-house was not let on that date, the rent at which it was last let before that date, or, in the case of a dwelling-house which was first let after the said 3rd day of August, the rent at which it was first let." The expression "standard rate of interest" is defined in the same sub-section—in s. 2, sub-s. 1 (*b*)—in the following terms: "The expression 'standard rate of interest' means in the case of a mortgage in force on the 3rd day of August, 1914, the rate of interest payable at that date, or, in the case of a mortgage created since that date, the original rate of interest"; and the Act contains also in s. 1, sub-s. 2, the provision on which the decision in each of these cases mainly depends. That sub-section is as follows: "A person shall not in consideration of the grant, renewal, or continuance of a tenancy of any dwelling-house to which this Act applies require the payment of any fine, premium, or other like sum in addition to the rent, and where any such payment has been made in respect of any such dwelling-house after the 25th day of November, 1915, then the amount shall be recoverable by the tenant by whom it was made from the landlord, and may without prejudice to any other method of recovery be deducted from any rent payable by him to the landlord, but this provision shall not apply to any payment under an agreement entered into before the 4th day of August, 1914."

Now, there can be no doubt from what has been said that each of the houses in question is a dwelling-house to which the Act applies. The standard rent in each case is much below 26*l.* per annum. Nor can there, I think, be any doubt that the payment of 55*l.* in the case of the plaintiff Rees and of 57*l.* 10*s.* in the case of the plaintiff Davies will if and when made be a payment of a "fine, premium, or other like sum in addition to the rent" within the meaning of s. 1, sub-s. 2. Further, I think it is clear that the sub-section is an independent provision, and it enacts in express terms and without any qualification that the payment of such "fine, premium, or other like sum" shall not be required, and that if it has been made after November 25, 1915, it shall be recoverable by the tenant paying it. The Act contains no provision analogous, for example, to that in s. 1, sub-s. 1 (iii.), protecting the payment if when spread over the whole tenancy and added to the rent it still leaves the whole payment less than the standard rent. The sub-section, in my opinion, makes the payment under the circumstances stated of anything which can be properly called a " fine, premium, or other like sum " one that cannot be required, and one which if made cannot be retained ; and the only question which remains is whether in these present cases the lease of ninety-nine years, in consideration of which the premium in each case is agreed to be paid, is " a tenancy " within the meaning of the sub-section.

Now it is, I think, clear that the tenancies which the Act has primarily in view are short tenancies—weekly tenancies and the like. This is indicated by the reference to the period of four weeks in s. 1, sub-s. 1 (vi.), and by the provisions of s. 1, sub-s. 3, which in effect give to a tenant of a dwelling-house to which the Act applies fixity of tenure for the duration of the Act provided that he observes certain conditions usually contained in leases properly so called, but which it is assumed he is not by contract bound to observe. Obviously, also, the mischief intended to be remedied by this temporary Act must be practically non-existent in the case of tenancies of substantial duration which were in existence when the Act came into force. But I can find nothing in the Act which enables me to say that a tenancy of any particular duration is beyond its scope. At one time I thought that the reference in s. 1, sub-s. 2, to an " agreement entered into before the 4th day of August, 1914," coupled with the provisions of s. 1, sub-s. 1 (iii.), to which I have already referred, might have enabled me to say that the Act had no reference to tenancies which required a deed for their validity—that is, in effect, to tenancies exceeding three years. But on consideration I am satisfied that no such line of demarcation can as a matter of construction be drawn, if only for the reason that the Act, as I have said, applies to Scotland, and on this point it so applies without any variation ; and, as I suppose is well known, no special formality is required by Scots law to make effective a tenancy of over three years which is not required to validate one of less duration.

Nor can I find any sure guide upon this point by a consideration of the provisions of the Act relating to the standard rate of interest. Presumably the prohibition of an increase in the rate of interest was inserted in the Act because it was supposed to be only fair that if the landlord was prevented from raising the rent of a small dwelling-house above the pre-war standard he should as a set-off be protected against any increase over the same standard in the rate of interest on the money borrowed by him upon its security, and the reference in the last proviso of s. 1, sub-s. 4, to the mortgage of "a leasehold interest" seemed at first sight to indicate that the Act was drawing a distinction between "a leasehold interest" and "a tenancy" so called. But nothing can, I think, be made of this. Whatever may have been the dominant reason for granting him relief, the owner-mortgagor of a small dwelling-house is under the Act entitled to the benefit of these provisions as to interest even if his house is not let at all, although he is not, it seems, entitled to the benefit of them if, being let, his house is let at less than two-thirds of its rateable value: see s. 2, sub-s. 6. Further, if the house has never been let, the Act imposes upon the owner no limitation upon the rent he may demand at the first letting: see s. 2, sub-s. 1 (*a*); but, however high be the rent he so obtains, he can never if he complies with s. 2, sub-s. 4, be required to pay more than the standard rate of interest on his mortgage. Inasmuch, therefore, as these interest provisions are practically independent of any question of tenancy or no tenancy, one finds in them no guide to the tenancies to which the other provisions of the Act apply.

I am forced, therefore, to the conclusion that, as a matter of construction, a tenancy is not outside the Act because it exceeds some particular period of duration; and, indeed, I can see that to introduce any arbitrary line of demarcation on such a matter might defeat the purpose of the Legislature, and, in regard at least to future tenancies, leave untouched the mischief which presumably Parliament set out to remedy; for if it were to be held that a lease of three years, or of any other duration, were outside the Act, nothing could be easier than to extend the new tenancies beyond that term, and the same pressure which led the tenant to pay an excessive rent and necessitated his protection against the exaction would compel him to bind himself, in form at least, to a tenancy of any duration which might be required of him, while the landlord would be in no peril under such an arrangement, for his right of re-entry for breach of covenant or for non-payment of rent would be his sufficient protection. In my opinion, therefore, the payment of the 55*l.* by the plaintiff Rees and of 57*l.* 10*s.* by the plaintiff Davies is, so far as s. 1, sub-s. 2, of the Act is concerned, not one which can be received or retained by the defendant.

It is, however, possible that s. 2, sub-s. 6, may still protect these transactions. That sub-section is as follows: "Where the standard rent payable in respect of any tenancy of a dwelling-house is less than two-thirds of the rateable value thereof, this Act shall not apply to that rent or tenancy nor to any mortgage by the landlord from whom the tenancy is held of his interest in the dwelling-house." I think, however, that that sub-section, although in spirit it may cover the cases now in debate, cannot as a matter of construction be extended to meet them. The standard rent in respect of both houses is, and always must be, 10*l.* 14*s.* 6*d.* and 9*l.* 8*s.* 6*d.* respectively, and neither rent is less than two-thirds of the rateable value of the house. If the sub-section had been framed thus: "Where the standard rent payable in respect of any tenancy of a dwelling-house is less than two-thirds of the rateable value thereof, or where the rent actually payable in respect of such tenancy is less than two-thirds of the standard rent, this Act shall not apply to that rent or tenancy," the case would, I think, have been different, but to insert these, or equivalent, words is beyond the province of a mere Court of construction, and without them the sub-section has not in it enough to support the contract in the case of either plaintiff.

Under these circumstances, are the plaintiffs entitled to have their leases free from the payment of any premium, and is the Court at their instance compelled to grant specific performance of the contract, omitting the term which, from the defendant's point of view, is the essential term of the bargain?

It is true that, while the Act does not compel the owner of a small dwelling-house to let it at all, it does, after he has once let the house, preclude him from taking for it more than the standard rent, and I agree that the actual terms of s. 1, sub-s. 2, do favour the contention of the plaintiffs on this point. But no possession

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has yet been taken under either contract, and, whatever might have been the position if such possession had been taken, I agree with the view of Mr. Wood that the Act makes the agreement to pay a premium an illegal agreement, and that the defendant is entitled to be relieved altogether from that agreement before possession is taken on his repaying to each plaintiff, as he is willing to do, everything he has received from him under it.

I need hardly say that no Court would be astute to take any other view of the matter, and, dealing as I am with transactions which are in no way within the mischief of the Act, as I understand it, and possessing as I do a discretion whether I shall grant specific performance or not, I would in any case decline to make a decree the result of which would do the greatest injustice to the defendant and would secure for the plaintiffs an advantage for which they did not bargain, and which neither of them, I think, either expects or desires.

In the view which I have taken of these cases, applicable as it is to both, it is unnecessary for me to deal specifically with the separate point under s. 1, sub-s. 1 (iii.), taken as against the plaintiff Davies, who is occupying tenant of his house.

I presume that the costs have been arranged. On that footing, and on the undertaking of the defendant to repay to each plaintiff the money he has actually paid under his contract, I dismiss both actions.

I greatly regret the result. I should gladly have supported each contract had I felt myself at liberty so to do. I realize that in another form the agreements might have been saved harmless by the Act, if for instance the rent reserved had been a peppercorn and the present value of the rent reserved had been added to the premium, or if the freehold, and not merely a leasehold interest, had been sold. But although the Act is arbitrary in many respects, that fact does not enable the Court to do violence to its terms in order to make it less arbitrary. Moreover, if the view I have taken of the Act be either accepted or upheld it will be for the Legislature to set the matter right by amendment if that which must then be taken to be the true construction of the Act is not in accordance with its desire and intent, and if it is desirous of leaving untouched by the Act such transactions as those with which I have had to deal. (1)

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Solicitors: *Bell, Brodrick & Gray, for J. D. Thomas, Aberdare; Torr & Co., for Corbett, Chambers & Harris, Cardiff.*

W. I. C.

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[1915 S. 3467.]

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Feb. 24, 25. 29; *March* 1; *April* 17.

Will—Construction—Copyholds—Appointment of Executors—Direction that Debts should be paid—General Devise and Bequest to named Persons—Direction that Everything should be sold without stating by whom—Implied Power to Executors to sell.

Testator by his will appointed executors and directed that his debts should be paid. He then gave and bequeathed all his real and personal estate, which included certain copyhold hereditaments, to seven named persons, and directed that everything should be sold, without saying by whom, and divided among the seven persons. He also directed that each of his executors should receive the sum of 10*l.* for his trouble. The executors contracted to sell the copyhold hereditaments to a purchaser, but the lord of the manor objected to the proposed conveyance by way of bargain and sale on the ground that they had no power of sale under the will:—

Held, that the executors had a power of sale by virtue of the charge of debts upon the copyholds which resulted from the direction that the debts should be paid.

Held, also, that the executors were the persons to sell by virtue of the direction that everything should be sold addressed, on construction, to them.

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(1) In consequence of this decision the Courts (Emergency Powers) (No. 2) Act, 1916 (6 & 7 Geo. 5, c. 18), was passed, which received the Royal assent on June 1, 1916, by s. 2 of which it is now provided:

"(1.) A county court may authorise the grant of a new lease for a term of twenty-one years or upwards of a dwelling-house to which the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, applies, in consideration for which a fine, premium, or other like sum, in addition to the rent, is required, if the Court is satisfied that the terms of the tenancy are on the whole not less favourable to the tenant than the terms on which the dwelling-house was previously let, and in such cases sub-section (2) of section one of the said Act shall not apply.

"(2.) This section shall be construed as one with the said Act."

Held, further, that such direction did not in order to be effective either involve or require any estate in the executors, so that on either view they could sell to a purchaser who would be entitled to be admitted direct without the previous admittance of the executors or of any other persons.

Holder v. *Preston* (1769) 2 Wils. 400 and *Reg.* v. *Wilson* (1862) 3 B. & S. 201; 9 Jur. (N.S.) 439, followed.

Patton v. *Randall* (1820) 1 Jac. & W. 189 discussed and distinguished.

SPECIAL CASE.

The action was brought by Joseph Sissons, Thomas Boydon, and Mrs. Elizabeth Walker against Walter George Raleigh Chichester-Constable and Harold Ringrose Jackson, claiming by their writ (1.) a declaration that the plaintiff Mrs. Walker as purchaser from the plaintiffs Sissons and Boydon, as the executors of the will of Robert Pickard Akitt, of the copyhold hereditaments of which the testator was tenant on the rolls of the manor of Withernsea-with-Owthorn in the county of York at the time of his death for an estate of inheritance to him and his heirs according to the custom of the manor was entitled to be admitted thereto to hold to her and her heirs at the will of the lord according to the custom of the manor and by and under the rents, suits, and services therefor due and of right accustomed upon a deed of bargain and sale of the hereditaments by the plaintiffs Sissons and Boydon as such executors as aforesaid, and (2.) an order directing the defendant Chichester-Constable as lord and the defendant Jackson as his steward of the manor to admit the plaintiff Mrs. Walker, as tenant according to the custom of the manor, to the hereditaments for the estate aforesaid.

By an order dated December 22, 1915, it was by consent ordered that pleadings in the action should be dispensed with and that the questions of law arising therein be stated in the form of a special case for the opinion of the Court.

A special case was accordingly stated from which the following facts appeared:—

The testator made his will, dated March 11, 1913, (so far as material) in the following terms: "I appoint Joseph Sissons of No. 10 Cambridge Street Withernsea East Yorks and Thomas Boydon of No. 17 Arthur Street Withernsea East Yorks to be my executors and I direct that all my just debts and funeral and testamentary expenses shall be paid as soon as possible after my decease. I hereby give and bequeath to my five cousins Mary Graves of Hessle, Emma Small of No. 12 Queen Street, Barton-on-Humber, Margaret Akitt of Holmpton, John Akitt of Holmpton, Wales Akitt of Holmpton and John William Gell the son of my cousin Horatio Gell of Holmpton and to my friend John Atkinson the present tenant of my farm Holmpton Road near Withernsea all my real and personal estate whatsoever and wheresoever to which I may be entitled at the time of my decease, everything to be sold and divided equally among the seven persons named in this my will share and share alike. I also direct that each of my executors Joseph Sissons and Thomas Boydon shall receive the sum of ten pounds for their services."

The testator died on April 13, 1915, and his will was duly proved by the executors therein named.

The seven beneficiaries named in the will all survived the testator.

The testator died seised of two freehold houses at Withernsea and also of the copyhold hereditaments in question, to which he had been duly admitted as tenant on the court rolls of the manor on July 17, 1914.

On May 19, 1915, the plaintiffs Sissons and Boydon offered the whole of the testator's real estate for sale by auction, and at the auction the plaintiff Mrs. Walker became the purchaser of the copyhold hereditaments.

In order to complete the plaintiff Mrs. Walker's purchase the draft of a deed of bargain and sale by the plaintiffs Sissons and Boydon as executors of the will of the copyhold hereditaments to her to hold to her and her heirs at the will of the lord according to the custom of the manor by and under the rents, suits, and services therefor due and of right accustomed was duly prepared on her behalf and approved on behalf of the other plaintiffs as vendors, and a copy thereof was sent to the defendant Jackson as steward of the manor for perusal.

The defendants informed the plaintiffs that they would not recognize a deed in the form of the proposed bargain and sale or any similar deed or instrument by the plaintiffs Sissons and Boydon as conferring on the plaintiff Mrs. Walker any right or title to be admitted to the copyhold hereditaments, and refused to admit the plaintiff Mrs. Walker on any such bargain and sale or other instrument being executed.

The plaintiffs contended that the plaintiffs Sissons and Boydon had by virtue of the will a power of sale over the copyhold hereditaments, and that by virtue of such power they could bargain and sell the hereditaments to the plaintiff Mrs. Walker so as to entitle her to be admitted thereto without the previous admittance of the plaintiffs Sissons and Boydon or of the beneficiaries under the will or any other person.

The defendants contended that the plaintiffs Sissons and Boydon had no such power of sale as alleged and could not by bargain and sale or other assurance confer any right or title on the plaintiff Mrs. Walker to be admitted to the copyhold hereditaments.

The question for the Court was whether the plaintiffs Sissons and Boydon had by virtue of the will a power of sale over the copyhold hereditaments in question and could by virtue of such power bargain and sell or otherwise assure the hereditaments to the plaintiff Mrs. Walker so as to entitle her to be admitted thereto without the previous admittance of the plaintiffs Sissons and Boydon or of the beneficiaries or of any other person.

H. J. H. Mackay, for the plaintiffs. It is submitted that the executors have power to sell the copyholds. The question in this case arises by reason of the fact that the customary estate in copyholds is not affected by the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, sub-s. 4. A devise of copyholds does not operate as a conveyance ; it merely gives the devisee a right to claim admittance : Scriven on Copyholds, 4th ed. p. 233 ; *Glass* v. *Richardson* (1) ; *Reg.* v. *Garland* (2) ; *Garland* v. *Mead.* (3) Copyholds were not within the Statute of Wills. The position of a devisee of copyholds is only that of a surrenderee. On the death of the testator the customary estate in the copyholds passes to the customary heir. The devisee takes no estate until admittance. The devise operates merely as a nomination by the testator of the person he desires to take the property.

(1) (1852) 9 Hare, 698, 703 ; (1852) 2 D. M. & G. 658.

(2) (1870) L. R. 5 Q. B. 269, 272.

(3) (1871) L. R. 6 Q. B. 441, 447.

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Here the will contains directions that everything is to be sold and divided "among the seven named persons," not "among themselves," and that the executors are to receive 10*l.* each for their services. This indicates that the executors are the persons intended to carry out the sale. Independently of that the testator has charged his property with the payment of his debts, and a general charge of debts gives the executors an implied power to sell the real estate: *Wrigley* v. *Sykes* (1); *Sabin* v. *Heape* (2), which was approved of in *In re Tanqueray-Willaume and Landau* (3); *Robinson* v. *Lowater* (4); see also the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act) (22 & 23 Vict. c. 35), s. 16.

Further, the testator has expressly blended his real and personal estate, and the case therefore falls within the rule that where a testator has by his will created a blended fund of realty and personalty, but has not said by whom the property is to be sold, the Court will imply a power to sell in the executors: *Tylden* v. *Hyde* (5); *Forbes* v. *Peacock* (6); *Flux* v. *Best* (7); *Davies to Jones and Evans.* (8)

If the executors have a power of sale, then the copyhold cases show that they can execute a deed of bargain and sale of the copyholds to a purchaser, and that the purchaser will be entitled to be admitted without the previous admittance of the executors or the customary heir: Scriven on Copyholds, 4th ed. p. 349; *In re Heathcote and Rawson's Contract* (9); *Holder* v. *Preston* (10); *Rex* v. *Lord of the Manor of Oundle* (11); *Reg.* v. *Wilson.* (12)

Here the executors can carry out the provisions of the will without the necessity of having the legal estate in the copyholds vested in them.

L. F. Potts, for the defendants. It is submitted that there is no implied power to sell in the executors, but that the power is vested in the devisees of the copyholds. The result of the cases is that if the executors take a bare power of sale without any devise to them they can sell to a purchaser, who may then be admitted direct without the previous admittance of the executors. If the customary estate devolves upon executors or trustees or any other persons, even although on trust for sale, those persons cannot sell without being first admitted, unless there is an express power to appoint, as there was in *Glass* v. *Richardson.* (1) In *Reg.* v. *Wilson* (2), referred to in Farwell on Powers, 2nd ed. p. 69, there was a mere power of sale vested in the executors, and therefore they could complete the sale without being first admitted. The statement in the report of the case in 11 W. R. 70 that the testator bequeathed his copyholds to his executors is erroneous: see also *Holder* v. *Preston.* (3) Where, however, there is a direct gift to trustees upon trust to sell, it is clear that the purchaser cannot be admitted without the previous admittance of the trustees. The trustees have a right to be admitted, but the legal estate is not vested in them until admittance. Further, the question as to the right to admittance is a purely legal one. The lord has nothing to do with trusts: *Lord Londesborough* v. *Foster.* (4) The words "everything to be sold" in the will in the present case create an absolute trust for sale and conversion. Where there is an express trust for sale there can be no implied power of sale. It is submitted, therefore, (1.) that the executors do not take a power of sale, and (2.) that, if they do, they take not merely that power, but also a legal right to be admitted, and therefore must be admitted before they can sell. As trustees for sale have the duty of keeping the real estate in repair until sale—*In re Hotchkys* (5)—it follows that in the case of copyholds they must be admitted. The Wills Act clearly enables a testator to devise copyholds notwithstanding that the legal estate in them does not vest in the devisees until admittance. It is submitted that there is here an express devise to the seven persons named in the will as joint tenants of the whole of the testator's estate and interest in the copyholds, and the proceeds are to be divided between them as tenants in common, and that they are consequently the proper persons to sell. There can therefore be no implied trust for sale in the executors: Farwell on Powers, 2nd ed. p. 72, citing *Patton* v. *Randall.* (6) If, however, the contention that the devisees are the proper persons to sell is wrong, then to enable the executors to sell they must have an implied power of sale, which may be either an equitable or a common law power. If an executor has only an equitable power he must get in the legal estate before he can sell. If he has a common law power he can pass on the legal estate without the necessity of being himself first admitted. At common law a charge of debts does not give an executor an implied power to sell for payment of debts: *Doe* v. *Hughes* (1); Lewin on Trusts, 12th ed. p. 544. In *Davies to Jones and Evans* (2), which is not unlike the present case, Pearson J. held upon the construction of the will as a whole that the executors had by necessary implication a legal estate in the land to enable them to discharge the duties imposed on them by the will. [He also referred to the Law of Property Amendment Act, 1859, ss. 14, 15, 16, 18.]

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(1) (1856) 21 Beav. 337.
(2) (1859) 27 Beav. 553.
(3) (1882) 20 Ch. D. 465.
(4) (1854) 5 D. M. & G. 272.
(5) (1825) 2 S. & S. 238, 241.
(6) (1840) 11 Sim. 152; (1843) 12 Sim. 528; (1843) 11 M. & W. 630, 637.
(7) (1875) 23 W. R. 228.
(8) (1883) 24 Ch. D. 190.
(9) (1913) 108 L. T. 185.
(10) 2 Wils. 400.
(11) (1834) 1 Ad. & E. 283.
(12) 3 B. & S. 201.

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(1) 9 Hare, 698.

(2) 3 B. & S. 201; 9 Jur. (N.S.) 439.

(3) 2 Wils. 400.

(4) (1863) 9 Jur. (N.S.) 1173.

(5) (1886) 32 Ch. D. 408.

(6) 1 Jac. & W. 189, 196.

H. J. H. Mackay in reply. *In re Barrow-in-Furness Corporation and Rawlinson's Contract* (3) shows that the common law power of sale is not affected by the Law of Property Amendment Act, 1859. If the executors have a power of sale, then they have power to execute a deed of bargain and sale: see Scriven on Copyholds, 7th ed. p. 195. The cases show that no matter how imperative the direction to sell is, and although it may amount to a trust, it is not necessary that the executors should be admitted. *Patton* v. *Randall* (4) is distinguishable. There the property was freehold and there was a direct devise of it to persons who were under age, and it was held that their minority was not a ground for implying a power of sale in the executors. [He also referred to *Ward* v. *Devon* (5); *Beal* v. *Shepherd* (6); Watkins on Copyholds, 4th ed. vol. 1, p. 127; Scriven on Copyholds, 4th ed. p. 349; Davidson's Precedents, 3rd ed. vol. 4, p. 82; Farwell on Powers, 2nd ed. pp. 69—72.]

Cur. adv. vult.

April 17. YOUNGER J. read the following judgment, in which, after stating the question asked by the special case, he continued: The answer to the question depends upon the true construction of a

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(1) (1851) 6 Ex. 223.
(2) 24 Ch. D. 190.
(3) [1903] 1 Ch. 339.
(4) 1 Jac. & W. 189.
(5) (1805) cited in 11 Sim. 160.
(6) (1607) Cro. Jac. 199.

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very informal will, and the application to that will when its true effect has been ascertained of certain principles of copyhold law which entitle the lord under particular circumstances to require that the customary heir or devisees on trust for sale of a deceased tenant's copyhold property shall first be admitted tenant or tenants on the rolls before a title to admittance can be claimed by a purchaser.

On the one hand it is contended by Mr. Mackay on behalf of the testator's executors and the purchaser from them that on the true construction of the testator's will they have either a common law power of sale over the whole of the testator's copyhold property or that they are expressly directed to sell it without any devise thereof in their favour. On the other hand it is contended by Mr. Potts on behalf of the lord of the manor that the only right to sell is vested in certain devisees of the copyhold hereditaments by way of trust for sale, and that the existence in the will of that devise not only shows that the executors are not the proper persons to sell, but it negatives any implied power of sale which otherwise might have been held to be theirs.

Now the will is as follows: "I appoint Joseph Sissons of No. 10 Cambridge Street, Withernsea, East Yorks, and Thomas Boydon of No. 17 Arthur Street, Withernsea, East Yorks, to be my executors and I direct that all my just debts and funeral and testamentary expenses shall be paid as soon as possible after my decease." So far it is, I think, reasonably clear, unless the construction is displaced by some subsequent provision, that these debts and expenses are to be paid by the executors. Then the testator goes on: [His Lordship then read the rest of the will as above set out, and continued:] The first clause containing the gift in question to the seven named persons indicates, I think, who the testator's beneficiaries are, and they are to take, according to the terms of his will, the whole of his real and personal estate. Literally that would leave nothing at all for debts or expenses, nor for the legacy of 10*l.* which is given to each executor. The gift must therefore on any view be subject to some qualification in that regard; and it is also, I think, on the construction of the whole will qualified in another respect: These beneficiaries are to take nothing in specie, everything is to be sold, and the proceeds are to be divided. And these proceeds are to be divided not by themselves but among them, presumably, therefore, as a matter of construction by somebody else; and, looking for that person and finding that the executors are to receive 10*l.* for their services, it seems sound construction to say that it is the executors who are to effect the division.

Taking then the whole will together, I feel little doubt as a matter of construction that it is the executors who are to pay the debts and expenses. It is they who are to divide the proceeds of sale, and it is, I think, quite clear on the will that those who have to divide are the persons who are directed to sell. There is only one word in the will that seems possibly to militate against this view: the executors are to "receive," not to "retain," 10*l.* each. At the strongest, however, the word is a neutral term, and it cannot, in my opinion, displace the construction which is alone, I think, fairly open on the rest of the will.

And this view seems to me to give a consistent construction to the instrument taken as a whole. Incidentally it justifies, as no other view could justify, the legacies which the executors are to receive expressly in return for their services. Nor can I arrive at the conclusion that the seven beneficiaries are, as suggested by Mr. Potts, trustees for sale. I am of opinion that their true position, as I have indicated, is that they are mere passive recipients of the divisible net proceeds of the sale of the testator's residuary real and personal estate which the testator contemplates and directs shall be made, as I think, by his executors.

But the question remains whether the devise in terms to the testator's seven beneficiaries prevents the Court from placing upon the will a construction in the above sense which would otherwise be permissible. Mr. Potts says that the devise has that preventive effect, and he cites in support of his argument the passage from Farwell on Powers, 2nd ed. p. 72, in the following terms: "If the land is devised direct to several in fee, with a direction superadded that it shall be sold, there is no implied power of sale in the executors, although the devisees are minors. The evidence of a contrary intention afforded by the devise is too strong"; the learned author citing in support of that statement the case of *Patton* v. *Randall.* (1) But if that case be referred to and the will there in question be examined it will be found that it is not a decision on which so general a statement can be based, for the will there construed was very special, and both it and the property dealt with by it were entirely different from those with which we have now to do. First of all, in *Patton* v. *Randall* (1) the property in question was freehold property, and the effect of the will was to pass to the children, as Sir Thomas Plumer held, "the fee, the whole legal and equitable estate." Now a devise of copyholds such as we have here has no such effect. Copyholds are not within the Statute of Wills, and a devise of copyholds merely passes the legal right to admittance. It does not pass the estate. That estate the lord gives on admittance: *Glass* v. *Richardson* (2); *Reg.* v. *Garland* (3); *In re Heathcote and Rawson's Contract.* (4)

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(1) 1 Jac. & W. 189, 196.

And there are many other points of difference between the two wills. In *Patton* v. *Randall* (5) the testator's desire and intention were that the property devised to his children should continue to be enjoyed by them in specie. It was only in one event that he directed the property to be sold, namely, if his adult children became dissatisfied with the management of his estate by his executors. In that event only did the testator direct a sale; he did not say by whom it was to be carried out, and there was certainly some reason for refusing to impute to him any direction that the persons to effect the sale were those whose faulty administration had rendered it desirable. Nothing of the kind, however, is to be found in the present case. Here the beneficiaries, as I think on construction, take nothing under the will but an interest in the proceeds of sale, while there are sundry indications to which reference has already been made that it is the executors and no one else who are to bring these proceeds into existence.

And it is not as if there were any rigid rule of construction requiring any special form of words to entitle the Court to give effect to that view. There are many cases which show that the determination of just such a question must turn upon the intention of the testator as collected from his whole will, and a case much nearer to the present than *Patton* v. *Randall* (5)—although it also relates to freehold land—is *Davies to Jones and Evans* (6), where on the construction of the whole will Pearson J. held that executors had by necessary implication a legal estate in the land so as to enable them to discharge the duties by the will imposed upon them. See also the observations of Farwell L.J. in *In re Heathcote and Rawson's Contract.* (1) The principle of the case of *Tyldon* v. *Hyde* (2) is also in point. There Sir John Leach said: " Where there is a general direction to sell, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors. Here the produce of the sale is to be confounded with the personal property, which must necessarily be divided by the executors; and, by the rule which I have stated, a power to sell is therefore implied to the executors." See also the judgment of Bacon V.-C. in *Flux* v. *Best.* (3)

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(1) 1 Jac. & W. 189, 195.
(2) 9 Hare, 698.
(3) L. R. 5 Q. B. 269.
(4) 108 L. T. 185.
(5) 1 Jac. & W. 189.
(6) 24 Ch. D. 190.

For these reasons I cannot come to the conclusion that there is any such general rule to be implied under all circumstances from a devise of the property to others as that for which Mr. Potts has contended, and I do not think that any such general rule was intended to be laid down in the passage from Farwell L.J.'s book which was cited by him. Indeed, on the whole case I agree with the view of Mr. Mackay, that the executors here have a power of sale by virtue of the charge of debts upon the copyhold estate which results from the testator's direction that his debts shall be paid. And if not so, then I agree with him in his further contention that the executors are the persons to sell by virtue of the direction that everything shall be sold addressed, as I think, on construction, to them. Such a direction does not to be effective either involve or require any estate to be in the executors, and the result is that on either view they can sell to a purchaser who is entitled to be admitted direct, without any previous admittance on the part of any one: see Scriven on Copyholds, 7th ed. p. 195; *Holder* v. *Preston* (4); *Reg.* v. *Wilson.* (5)

In my opinion, therefore, the question in the special case should be answered in the affirmative. There will be a declaration in accordance with the answer to the special case, and, as the declaration

(1) 108 L. T. 185.
(2) 2 S. & S. 238, 241.
(3) 23 W. R. 228.
(4) 2 Wils. 400.
(5) 3 B. & S. 201.

disposes of the whole action, there will be judgment in the action consequential upon the declaration, and the defendants must pay the plaintiffs' costs.

Solicitors: *Bell, Brodrick & Gray, for Winter & Son, Hull; Collyer-Bristow & Co., for Stamp, Jackson & Birks, Hull.*

W. I. C.

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Jan. 11, 12.

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[1914 S. 2584.]

Applied. W. BRUCE LD. *v.* J. STRONG [1951] 2 K. B. 447

Injunction—Contract—Arbitration—Declaration of War—Embargo—Impossibility of Performance.

S., C. & B. had made contracts to purchase beet sugar to be delivered f.o.b. at Hamburg in August, 1914. On July 31, 1914, the German Government placed an embargo on the export of beet sugar. S., C. & B. contracted with B., G. & Co., neither party knowing of the embargo, to sell to them sugar to be delivered at Hamburg. This contract incorporated the rules of the Sugar Association of London, including a war clause whereby in the event of a German war contracts were to be deemed to be closed and were to be referred to the Sugar Association Council, and provisions for arbitration:—

Held, affirming the decision of Warrington J., that although the contract, owing to the war and the declarations against trading with the enemy, could no longer be carried out, it was not invalid when it was made, and that it might have been carried out by delivering the sugar to a warehouse at Hamburg; that the parties were bound by the arbitration clause; and that B., G. & Co.'s proceedings under that clause ought not to be restrained.

APPEAL from a decision of Warrington J.

In 1914 the plaintiffs had agreed to purchase a certain number of bags of beet sugar to be delivered f.o.b. at Hamburg in the month of August, 1914, at a certain price. On July 31 the German Government placed an embargo on the export of beet sugar. That fact was not known in Liverpool, where the plaintiffs carried on business, on August 1, but the near approach of war was obvious, and there was a panic in the Liverpool sugar trade. On August 1 the plaintiffs gave orders to the respondents, who were brokers in

London, to sell the August sugar which they had contracted to buy at the best price they could obtain. Thereupon the respondents entered into the contracts in question in the present proceedings between them as buyers and the plaintiffs as sellers, whereby it was provided that "we have this day bought of you for our own account" so many bags of the particular sugar "in accordance with the rules, regulations and by-laws of the Sugar Association of London and of the clearing department thereof to be delivered in August free on board at Hamburg," and "subject to the regulations and conditions of the London Produce Clearing House, Limited, for sugar future delivery business and subject to war clause as printed overleaf." Then it was provided: "This contract shall be forthwith registered with the London Produce Clearing House, Limited, and subject to its regulations when so registered shall take effect as if the respective parties thereto had contracted with the London Produce Clearing House, Limited, instead of each other, and upon such registration all liability of the parties to this contract to each other shall cease." The same clause was inserted in the purchase contracts in accordance with the regulations of the Sugar Association. The Clearing House thus became the purchaser from the seller and the seller to the purchaser, and if a succession of such contracts were made the whole series of transactions could be carried out by the Clearing House, the first seller selling to the ultimate buyer and the profit or loss made or suffered by the intermediate purchasers being settled through the Clearing House. The contract on registration became a contract between the parties to it and the Clearing House, and the relation of the parties to each other disappeared.

The Sugar Association of London published a book of rules and regulations of which the following were material:—

"Rules relating to the Clearing Contract. Arbitration and Legal.

"351. Every form of contract printed or issued by or with the authority of the clearing department of the association shall be deemed to incorporate all the rules of the Sugar Association of London, clearing department, and shall contain a clause in the following form, viz.: The above mentioned rules, regulations and by-laws are incorporated in this contract, as fully as if the same had been expressly inserted herein, notwithstanding either or both of the parties to it be not a member or members (as the case may be) of the association. The committee is the referee of all disputes.

"352. Any disputes that may arise out of or in relation to any clearing contract, or out of or in relation to any alleged contract, circle, filière, bill of lading, warrant, or any other dealing or matter contemplated by the clearing rules, whether any such circle or filière has from whatever cause been interrupted or broken or not, and whether the members of the clearing department, or the parties to the contract between whom the dispute arise, are mutually contracting parties or not, shall be referred to the committee.

"353. Such submission or reference shall be in writing and shall be deemed to incorporate a provision for its being made a rule of any of the divisions of His Majesty's High Court of Justice in Ireland; and for the same, as well as the decision or award to be made in pursuance thereof, being registered for execution in the Court of Session in Scotland on the application of either contracting party, for the purpose of enforcing an award against a party residing or carrying on business in Ireland or Scotland respectively. Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled in accordance with the provisions of rule 352, and it is expressly agreed that the obtaining an award shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any such contract.

"354. Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the Court to require any referee, arbitrator, or umpire, to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed."

Under rules 420, 421, and 422 the buyer was under an obligation to give either practicable shipping instructions or practicable storing instructions.

"491. Whenever either a buyer or seller has failed to complete a contract, or the same would but for this rule be liable to be cancelled, or has failed to meet his margin liabilities, such contract shall, on the application of either party, or any third party interested, be closed by settlement at a price to be fixed by the committee, which price shall not be less than 3*d.* per cwt., nor more than 2*s.* 6*d.* per cwt., under or over the value of the sugar on the day upon which the default occurs, and then by passing pro forma invoices at their respective contract prices and re-invoicing at the closing prices. The difference between the price fixed by the committee and the contract price shall be due in cash forthwith, less two months' interest at 5 per cent. per annum; but a contract for delivery by periodical instalments shall not be cancelled on account of delay or failure in the delivery of a single instalment.

"491A. In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed, shall, on official notice being given that such a state of war exists, be deemed to be closed at the average quotation (*a*) of the official calls held on the sixth working day, (*b*) counted backwards from the day when such official notice is given, not counting the day of official notice (nor any date on which there is no official quotation to count as a working day), and accounts shall be made up with and between the contracting parties, who shall accept such settlement as complete and final; all differences arising therefrom shall be due immediately.

"The guiding dates to make the war clause operative will be the declaration of war of either belligerent or a Proclamation or other notification by the British Government in the case of a war between Great Britain and Germany, whichever occur first, and/or the British declaration of neutrality in the case of a war between Germany and another Power.

"(*a*) The average quotation will be taken to the nearest farthing; if equidistant between farthings, the higher figure will prevail. Contracts open for unquoted months will be taken at relative parity.

"(*b*) If the official notice were dated 18th December, and the 15th were a Sunday, the quotations of 11th December would be taken.

"491B. For the purposes of the war clause, a contract against which a tender has been made shall be deemed a closed contract. Should the state of war prevent shipment or warehousing and/or passing of documents, then any party to the contract shall be

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entitled to appeal to the council for a decision which shall be binding on all concerned."

The contracts were signed by the plaintiffs on August 5. War was declared and Proclamations against trading with the enemy issued on August 4. The plaintiffs brought this action for a declaration that the contracts were impossible of performance by reason of the embargo; a declaration that the contracts were illegal by reason of the Proclamations; and an injunction to restrain the respondents from proceeding with any arbitration having reference to the contracts.

Warrington J. held that the contracts could not be carried out but were not invalid when they were made, and the parties were bound by the arbitration clause. His Lordship made an order refusing the injunction and staying the proceedings in the action.

The plaintiffs appealed.

Maurice Hill, K.C., and *Devonshire*, for the appellants. The contracts are void and there is no longer any provision for arbitration nor any question to be decided. There never were any contracts which could have been performed, for at the time when they were entered into the German embargo had been imposed and they could not have been carried out. There was a common mistake. If a foreign Power produces a disability in both parties to a contract to perform their mutually dependent obligations, as readiness and ability to provide and take in cargo, or to deliver and to receive cargo, neither party can maintain an action against the other: Leake on Contracts, 6th ed. p. 511; *Ford* v. *Cotesworth* (1); *Cunningham* v. *Dunn.* (2)

Clauson, K.C., and *J. M. Gover*, for the respondents. The decision appealed from is right. The contracts were valid when they were made, and contained, by reference, arbitration clauses wide enough to cover all these questions. Such provisions are in common use in the city of London. There is no legal ground for impeaching these contracts. The embargo did not prevent delivery of the sugar in warehouses at Hamburg. Therefore the proceedings in the action ought to be stayed and the arbitration ought to proceed.

(1) (1870) L. R. 5 Q. B. 544.

(2) (1878) 3 C. P. D. 443.

Devonshire in reply. The Court will restrain a reference to arbitration until the right to impeach the contract has been determined: *Kitts* v. *Moore.* (1)

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LORD COZENS-HARDY M.R. This is an appeal from two orders made by Warrington J., in the first place refusing an injunction against proceedings in an arbitration, and in the next place granting a summons to stay proceedings in this action. The material facts, I think, will not occupy much time in stating. The plaintiffs and defendants are both British subjects; there is no question of alien enemies—they are both British subjects. They are both dealers, whether as brokers or otherwise does not matter, in sugar. In the spring or summer of 1914, long before the war began, the plaintiffs had bought, that is to say, had contracted to buy, a large quantity of sugar at a price very much higher than it was at the end of July, when there was a great fall in the market. The sugar was to be delivered at Hamburg. They were anxious to cover their liability in respect of that contract. That contract was for delivery in the month of August. They therefore sought to and did cover their liability by selling an equivalent amount, also for August. Before reading the contract, or the material parts of the contract, I ought to say that the rights of the parties here are really dependent upon the terms of what I may call a clearing-house arrangement, an arrangement of a complicated nature under which a number of bargains for the sale and purchase of sugar are ultimately settled by the payment of differences. In my view nothing turns upon the details of that arrangement, although I may shortly have to refer to it. The contract in question is dated August 1, just before the declaration of war, and it is in these terms: "We have this day bought of you for our own account 6500 bags beetroot sugar," describing it. "Delivery August, 1914. Price, 7*s.* per cwt. net," which was a great deal less than the price in the contract for the purchase by the plaintiffs. It is then "subject to the regulations and conditions of the London Produce Clearing House, Limited, for sugar future delivery business and subject to war clause as printed overleaf." The plaintiffs in this action sought a declaration that the contract which I have read here was

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(1) [1895] 1 Q. B. 253, 259.

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illegal by reason of the war. Of course, if it was illegal, then any question of arbitration under the contract would fall with it. It is sought to say that it is illegal because of the declaration of war which took place on August 4, and it is said that that made the contract illegal, and that it could not be enforced by either party. It is also said that if the contract is not tainted with illegality, still, by reason of an embargo, the nature and extent of which are left exceedingly obscure upon the evidence,—an embargo put by the German Government upon the export of sugar from Hamburg on the 31st—the contract, though not so illegal, ought not to be enforced because it must be taken to have been an implied term by both parties to the contract that it should have been possible to export the sugar, and that, somewhat on the principle of *Taylor* v. *Caldwell* (1) and other well-known cases, the contract, though not illegal, was affected by some definite vice (shall I say) which prevented any right being secured by either party to it.

As to the first point, if the plaintiffs are right upon that it is quite clear that the action ought to go on, and that the order made by Warrington J. cannot be sustained, but in my opinion that is really not an arguable point. It seems to me perfectly clear that there was nothing illegal in this contract and nothing to justify the contention of illegality. For what was the contract? Putting it shortly it was this: "I sell you a lot of sugar at Hamburg to be delivered f.o.b. either on board ship or in warehouse, or if by reason of war that cannot be done, I will pay you a sum of cash." What is the difficulty? There is no illegality at all. It is a contract with two branches, two alternatives: "If I cannot deliver you the specific goods I will pay you a sum of cash." On the face of the contract that is its true construction and effect, and there is absolutely nothing in the contention of illegality. I must read the war clause so far as is necessary, the war clause being, as I say, expressly incorporated in the contract: "In the event of Germany being involved in a war with either England, France, Russia, and/or Austria, this contract, unless previously closed,"—and the present contract was not closed before that—"shall, on official notice being given that such a state of war exists, be deemed to be closed at the average quotation (*a*) of the official calls held on the sixth working day, (*b*) counted backwards from the day when such official notice is given, not counting the day of official notice (nor any date on which there is no official quotation to count as a working day), and accounts shall be made up with and between the contracting parties, who shall accept such settlement as complete and final; all differences arising therefrom shall be due immediately." I find, therefore, on the face of the contract that the outbreak of a state of war was contemplated, and in that event the second alternative of the contract took effect, no obligation to deliver the sugar at Hamburg, but, instead of that, an obligation to pay a sum of cash ascertained in the manner here stated.

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(1) (1863) 3 B. & S. 826.

Then it is said, "Oh, but there was the embargo." I have listened in vain for any authority which justified the view that the mere embargo upon the export of sugar, whatever be its terms (as to which we know nothing), was in itself a termination of the rights of the parties under the contract, or that it is in any way reasonable to suppose that the parties, when they entered into this contract, did it on the assumption that there would be no embargo on the export of sugar. It is, according to the terms of the contract and of the documents incorporated therewith, for the buyer to say whether his sugar which he has purchased is to be delivered on board a vessel at Hamburg or whether it is to be warehoused there. It seems to me that there is nothing in the embargo to prevent a purchaser saying to the seller, if he is so minded, "I do not want my sugar shipped to be exported; warehouse this for me at Hamburg." That being so, I fail to see any ground whatever for holding that the contract is either illegal on the first ground, or, though not illegal, of such a nature that both parties are relieved from its obligations on the principle of *Taylor* v. *Caldwell* (1) and cases of a similar class. I therefore entirely agree with what Warrington J. said, that the injunction fails.

Now the second point is this: If there is no ground for saying that the contract is void, or that there is no contract at all, what are the provisions contained in the contract? For that purpose of course it is necessary to look at this extraordinary code of more than 500 clauses, which is supposed to be incorporated in every contract for the sale and purchase of sugar. There are upwards of

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(1) 3 B. & S. 826.

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500 clauses. If I refer to rule 351 I see the words "The committee is the referee of all disputes." The next rule is "Any disputes that may arise out of or in relation to . . . any alleged contract, circle, filière, bill of lading, warrant, or any other dealing or matter contemplated by the clearing rules, whether any such circle or filière has from whatever cause been interrupted or broken or not, and whether the members of the clearing department, or the parties to the contract between whom the dispute arise, are mutually contracting parties or not, shall be referred to the committee." And in the next rule there is an express stipulation that the submission or reference is to be in writing and shall be made a rule of Court; and then it is provided by rule 353 that "Neither buyer, seller, trustee in bankruptcy, nor any other person claiming under either of them, shall bring any action against the other of them in respect of any such dispute until such dispute has been settled in accordance with the provisions of rule 352, and it is expressly agreed that the obtaining an award shall be a condition precedent to the right of either contracting party to sue the other in respect of any claim arising out of any such contract." So that this is as stringent and wide an arbitration clause as it is possible to imagine, and expressly makes the obtaining of an award a condition before which no action can be maintained by either party to the contract. Then there is rule 354, which perhaps I ought to mention: "Neither buyer, seller, trustee in bankruptcy, nor any other person as aforesaid, shall require, nor shall they apply to the Court to require any referee, arbitrator, or umpire, to state in the form of a special case for the opinion of the Court any question of law arising in the course of the reference, but such question of law shall be determined by arbitration in manner herein directed." When once we have got to the point that there is a contract, and a contract which confers rights upon both parties, it seems to me that the case is really at an end. The parties have in terms agreed that their mutual rights and obligations shall be settled by arbitration, and in no other way. It may or may not be a very foolish thing to have such a term. It is not for me to say what my own view may be in the matter, but as a matter of business I suppose these gentlemen engaged in trade prefer such a tribunal to the Courts. It is quite clear that it is no objection to the enforce-

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ment of a clause like this that there are difficult questions of law, and may be difficult questions of fact, to decide. The parties have selected the tribunal, and in the absence of very special circumstances the Court of first instance ought to hesitate greatly before allowing the arbitral tribunal to be in any way interfered with, and certainly when the judge in the Court below has exercised judicially his discretion the Court of Appeal ought to think once and think twice before it interferes with the discretion.

In my opinion there is nothing in the present case which justifies a contention that this is not a fit question to be decided by the arbitrators. It is a question which falls within the express language of the arbitration clause, and in my opinion it would be very wrong for us to say that this ought not to go to the tribunal which the parties themselves have selected, but ought to be kept in this action in some form. In my opinion the judgment of Warrington J. was perfectly right on both points, and this appeal must be dismissed with the usual consequences.

Swinfen Eady L.J. I am of the same opinion. The contract in question is a contract for the sale of a quantity of beet sugar for August delivery, and the contract embodies the "rules, regulations, and by-laws of the Sugar Association of London and of the clearing department thereof," and further it is "subject to the regulations and conditions of the London Produce Clearing House, Limited, for sugar future delivery business, and subject to war clause as printed overleaf." The conditions embodied include a submission or reference to arbitration. They provide that disputes are to be settled by arbitration, and then comes rule 353, and the latter part of that rule is exceedingly comprehensive. [His Lordship read it.] The plaintiffs claim an injunction, but if the contract is subsisting the only remedy which the defendants have is arbitration, because the award is a condition precedent to either party suing the other. The contract was for future delivery, that is, August delivery, and it is not disputed that under the terms of such contract the seller had the whole of August in which to deliver the sugar or to tender the sugar for delivery. The buyer was not entitled to require delivery at any particular date in August, the option lay with the seller during the whole of the month including the last day when

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he would tender the sugar. When the sugar was tendered, then the buyer had an option with regard to the mode of delivery. It was open to him to give either practicable shipping instructions, that would be to take delivery in the port of Hamburg f.o.b. a ship at Hamburg, or practicable storing instructions, and then the rules defined what "practicable storing instructions" meant. It means "the naming of a warehouse within the limits of port of shipment which can receive the sugar within eight days from the date of instructions." Then, "At Hamburg only such warehouses allowed as have been approved by the General Agency and are on the list authorised by them." In other words, he can take delivery on board a ship at Hamburg, or in a permitted warehouse at Hamburg, with a view to the sugar being warehoused.

With regard to the embargo, it was hardly contended that the embargo in any way rendered the contract illegal. It might and no doubt would have delayed for a certain time, so long as the embargo subsisted, shipment from Hamburg, but it is not suggested that it would have delayed taking delivery in a warehouse at Hamburg. It does not appear whether the embargo was or was not in fact known to the parties. It is a little curious that persons in the sugar trade should not have known on August 1, if on the previous July 31 the embargo had been placed on the export of sugar at Hamburg, and Mr. Smith in his affidavit puts it this way: "At the time such contracts were entered into my firm had no definite knowledge that, as the fact is, an embargo had been placed on the export of sugar by the German Government." We have before us no definite information with regard to the terms of the embargo. All that we know is generally that the export of sugar from Hamburg had been stopped by the German Government. On August 4 there was a state of war as from 11 P.M. It did not appear what was the date of the official notification. I think it was on August 5, but the war clause in the contract enables one to interpret without difficulty the rules of the Clearing House with regard to future delivery in the event of war, because part of the war clause indorsed on the contract is this: "The guiding dates to make the war clause operative will be the declaration of war of either belligerent or a Proclamation or other notification by the British Government in the case of a war between Great Britain and

Germany, whichever occur first, and/or the British declaration of neutrality in the case of a war between Germany and another Power." There was an official notification by the British Government of a state of war as from 11 P.M. on Tuesday, August 4, between Great Britain and Germany. The result, therefore, is that as regards the embargo there was nothing in that which rendered the contract illegal or prevented its execution. Four or five days after the date of the embargo followed a state of war, and the contract in terms provides what is to happen in that event. In my judgment there is nothing in the embargo that renders the contract in any way illegal or impossible of execution, and there is nothing illegal in the provision that in the event of war the contract shall be deemed closed on certain terms, with a payment of difference resulting. There is nothing illegal in such a stipulation. It is a perfectly valid stipulation providing for an event which actually happened. In those circumstances I am of opinion that whatever the rights of the parties may be, whatever disputes may arise out of the contract, they are within the arbitration clause. The contract is a subsisting contract for the purpose of going to arbitration, and the arbitrators are the proper tribunal. It was suggested—I will not say more—at one time that there was an objection to the personnel of the tribunal of arbitration, but the parties are all engaged in the sugar trade, and in terms that was withdrawn. Mr. Devonshire said he would not press the point about the composition of the committee, so I do not further refer to that. Nothing further was made of it.

The result, therefore, is that there is a legal subsisting agreement to refer disputes to arbitration, and under which arbitration is a condition precedent to any action being brought. It therefore follows that the disputes must be referred to arbitration and the action stayed. For these reasons I am of opinion that the judge below was right, and that the appeal fails.

PHILLIMORE L.J. I agree. The award which the defendants are seeking to get is one from an arbitral tribunal, being the committee of the council of the association, and is one which will be obtained, if at all, under rules 352 and 353. What the defendants are desirous of getting is not a decision from the council under

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rule 491B. No doubt there has been some looseness in statement in some of the proceedings before this appeal was brought, but the defendants disclaim, as I understand, any attempt to use rule 491B, or the procedure there provided for, and it seems clear upon the papers that that is not the proper form of application. This case is not a case under rule 491B, and we have therefore not to consider what would happen if it was. In the case of *Edward Grey & Co.* v. *Tolme & Runge* (1), which was decided last sittings by a branch of this Court of which I happened to be a member, the application was, or would have been if allowed to proceed, under rule 491B. I say "if allowed." I ought to correct that, because we issued no injunction against proceedings; we only refused to stay the action in the High Court. Rule 491B is a very peculiar rule as to which I find by my notes that counsel expressed different views at different times, and as to which every member of the Court, I think, reserved his opinion as to whether it constituted an arbitral tribunal at all, or what powers the tribunal if any would have. Therefore I brush aside any point arising under rule 491B, and I find under rules 352 and 353, which with the other rules in this book are incorporated in this contract, an ordinary provision for reference to arbitration before a committee of the council of this association of people engaged in the beet sugar trade. There is no reason on the face of those rules why arbitration should not be sought for. The plaintiffs' first point, however, is that there is no contract, and if no contract, then, of course, no arbitration clause. They are entitled to submit that position to the Courts, and if they can succeed in maintaining it they are entitled, no doubt, to an injunction to restrain arbitration; but I think they have mistaken the force and effect of the case of *Kitts* v. *Moore* (2) when they say that it is enough for them in these circumstances to show a prima facie possibility that the contract cannot be enforceable; either that it may originally have been invalid or that it may have become unenforceable by reason of destruction of the subject-matter of the contract or a state of things supervening which makes it impossible of execution, or that the contract was made under such a common mistake of fact as to entitle either party to rescission. It is quite

(1) (1914) 31 Times L. R. 137.

(2) [1895] 1 Q. B. 253.

true that there are strong expressions in *Kitts* v. *Moore* (1) as to the practice of the Court in granting injunctions when there is a probability without a certainty that the contract may turn out to be no contract, but *Kitts* v. *Moore* (1) was not a case like this, where the obtaining of an award is a condition precedent to any right of recovery, and it would be wrong, in my view, to apply *Kitts* v. *Moore* (1) in all its force to such a case. I think, therefore, that the plaintiffs here had to make out to our satisfaction that there was no contract. How have they sought to do that? First of all they suggested that the contract was an illegal contract, or involved illegality. I think they failed to prove that. There is nothing to prevent two subjects of the King contracting with regard to goods which are in foreign parts in such terms as these: "I will sell and you will buy. I will deliver and you will take delivery, but if war between the country where the goods are and our own country, or war between the country where the goods are and some other country, prevents my delivering and your taking delivery, nevertheless one or other of us shall pay to the other a liquidated sum in respect of our original contract to sell and to buy." Such a contract is a possible contract, and there is no taint of illegality in it so far. Then at the time that the contract was made the two nations, Germany and Great Britain, were not at war, and, that being so, it was legal to make an arrangement under which goods in Germany should be sold and bought, delivered and received, or, in the alternative, if it became impossible or inconvenient by reason of war with this country or with another country to carry out the contract, that a sum of money should be paid as between the parties.

The next point is that the contract was void because at the time of the contract, without the knowledge of the parties, the subject-matter of the contract might be said to be destroyed or put extra commercium, put into such a condition that it was impossible to deal with it, and that therefore on the principles of *Taylor* v. *Caldwell* (2) and some other cases the contract was to be deemed not to have ever been made. That depends upon the embargo. I do not know that I quite agree with the view that the parties knew of the embargo, or even had any idea of the embargo. Having

(1) [1895] 1 Q. B. 253.
(2) 3 B. & S. 826.

regard to the defendants' affidavit, I think we are bound to take the view that the parties contracted on August 1, odd as it may be, without knowledge of the embargo which had taken place on July 31. If, instead of the embargo, there had been a conflagration at Hamburg, and all the crop of sugar had been at Hamburg and all of it had been destroyed, then I think the contract of August 1 would have been no contract, and no proceedings could have been taken for arbitration under it. But I do not think that it is made out by the plaintiffs, and I do not think it is at all likely that they could make out, that the embargo has that effect. As has been pointed out by other members of the Court, there are two ways in which the purchaser can take delivery here. He can take delivery on ship or he can take delivery into a named warehouse or *lagerhaus*. Dealing with the embargo only as made on July 31 —and that is what we have to deal with, regardless altogether of the war between Germany and Russia, which began probably on August 2, and regardless of the war between Great Britain and Germany, which began at 11 o'clock on the evening of August 4, all of which are events which happened after the contract, and which are provided for by the war clause—one sees no reason why on July 31 or August 1 the purchaser should not have named a warehouse into which the sugar, if not already there, could have been delivered without any interference by the German Government and without any violation of such embargo as we have had suggested. Perhaps it is always unwise to use words which have a technical meaning in a not strictly technical sense, and I prefer to substitute for the word " embargo " the words " prohibition of export," and I see no reason why prohibition of export should have prevented a transfer from one warehouse to another, or a notional transfer of property in the warehouse from seller to buyer. Therefore it does not seem to me that the plaintiffs have made out that the contract was void or even voidable as entered into under a common mistake of fact. Therefore I think that their application for an injunction fails, as, indeed, the application for an injunction failed in the case of *Edward Grey & Co.* v. *Tolme & Runge*. (1) It failed, I think, before the judge in chambers, and that matter never came before the Court of Appeal.

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(1) 31 Times L. R. 137.

Then the only point left to consider is whether there are special reasons for preventing the parties from applying to that domestic tribunal to which they have agreed. There are cases in which the Court has exercised a discretion where it has appeared that there is nothing but a point of law which will have to be decided, and where, if the matter goes to arbitrators, the arbitrators could be compelled to send the case back to the Courts of law by one or other of the procedures known under the Arbitration Act. But, to begin with, in this particular case the parties have intended, if they lawfully can, to make the decision of their domestic tribunal conclusive and independent of any act by a Court of law; and, secondly,—and this is the matter which weighs most with me—an arbitration is necessary whatever view is taken, because an award by the arbitrators is a condition precedent to the defendants' right to recover that sum of money to which they claim to be entitled. When the Court has exercised its discretion and has refused to stay an action because it sees that the matter is merely a point of law, it has done so upon the principle that it is a more convenient mode of trial to have the matter tried directly in the action instead of indirectly by an arbitration and the statement of a case, but it has never refused to stay an action where it is obvious that the case must go to arbitration, and the case must go to arbitration where an award is a condition precedent.

The only matter then that is left is the objection which, in the first instance, is of some importance to the composition of the arbitral tribunal. There is no doubt that in a body such as this is the people who rise to the position of being members of the council and members of a select committee of the council are probably some of the most important merchants in the trade, and are probably interested, if not directly, indirectly, in any at any rate important and general matter which may come before them for decision. I do not know that the plaintiffs were not justified in the rather temperate and moderate way in which they stated their objection to going before some of their fellow-merchants in this case, and it was frankly admitted, I think, by Mr. Clauson that in all probability the members of the tribunal would be, if not directly, indirectly interested in the sense that it might affect other contracts in so farreaching a decision as there may be in this case, but it cannot be helped. The parties have agreed that it should be a condition precedent that there shall be such a tribunal and they must go before the arbitral tribunal, and it is not open to the plaintiffs to take advantage of the fact that third parties whose fiat is necessary are interested. The plaintiffs have agreed that this fiat should be obtained, and they must be taken to have contemplated that the fiat would very likely be got from a body or from persons who will have an interest, indirect or moral, in the result of an arbitration; and, as I think has been already pointed out by the Master of the Rolls, rule 352 shows that the parties have contemplated some such possible objection and have provided for it. It is specially said at the end, "whether the members of the clearing department, or the parties to the contract between whom the dispute arise, are mutually contracting parties or not, shall be referred to the committee." It must be remembered that these contracts as a rule get transferred from vendor and purchaser to the Clearing House, the very committee of which is to be the tribunal of arbitration; and not taking it that it is shown that all the members, or all the necessary quorum of the committee, are interested—for it is not so shown, and, indeed, it is hardly suggested that they are directly interested—not taking it that they are, still, even if they had been, it seems to me that that would not be a reason for staying this arbitration.

One other matter remains which was a good deal discussed before us, and as to which we expressed a preliminary opinion, which I want for one purpose to withdraw. We had a discussion as to the meaning of the words "official notice." I do not withdraw from any expression of opinion we made about it, but it does not seem to me that we are the people to decide that. Once this matter goes to the arbitration tribunal under rules 352 and 353, it will be for the arbitration tribunal to decide whether rule 491 has or has not come into operation. It will be for them to say whether the official notice has been given or not, and we must leave that in their hands, as we must leave all the other points in the case.

The result is that the injunction unquestionably fails and that the order to stay was rightly made, because the only tribunal which can determine this matter is the tribunal which the parties have contemplated.

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Appeal dismissed.

Solicitors for appellants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

Solicitors for respondents: *Rehder & Higgs.*

H. C. R.

In re BAGOTS, HUTTON & CO.'S TRADE MARK.

[1914 B. 564.]

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Trade Mark—Registration—Cat—Gin—Similarity of Device—"Calculated to deceive"—Statutory Declarations—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19, 49.

On an application by spirit merchants to register in class 43 for gin a trade mark consisting of a representation of a puss in boots in a particular position it appeared that by long usage a representation of a cat had become a mark commonly used by many members of the trade, and that the goods of one of the opponents of registration had become known in some Eastern countries as Cat goods; and it was urged that the registration must cause confusion:—

Held, that this was only a bare possibility and did not make the applicants' mark "calculated to deceive"; that there was not sufficient resemblance between the marks to lead to confusion; and that the applicants, who had honestly used their mark for many years, ought not to be deprived of the privilege of registration on such grounds.

The practice of taking evidence by statutory declaration without cross-examination must not be abused.

Decision of Neville J. reversed.

Appeal from a decision of Neville J.

Messrs. Bagots, Hutton & Co., Limited, applied for the registration in class 43 for gin of a trade mark comprising a picture of a cat in boots. This was opposed on the ground that a cat was a common mark for the trade and that in some Eastern countries certain gin was known and sold as "Cat Brand." It was contended that the use of the proposed trade mark would be "calculated to deceive" within s. 11 of the Trade Marks Act, 1905, and that registration ought to be refused. Neville J. took this view and refused

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registration; the applicants appealed. The following statement of facts is taken from the judgment of Phillimore L.J.:—

The applicants, Bagots, Hutton & Co., Limited, applied on February 20, 1912, for the registration in class 43, in respect of gin, of a trade mark consisting of a picture of a "Puss in boots"—that is to say, a cat with boots on, a hat and feather lying on the ground, the cat in a sitting attitude upon snow with a snowy landscape, and a bottle lying on the ground by its side, holding a glass in its hand, with the words "Cordial Old Tom Gin. Snowdrop." Some correspondence passed between the applicants and the registrar, in the course of which the applicants disclaimed any right to the exclusive use of the representation of a cat, and contended that the device of a cat was common to the trade. Eventually the registrar refused the application, giving as his reasons that the applicants had had another mark consisting of two cats, one upright and one lying down, which had been cancelled; that the proposed mark was calculated to deceive, having regard to a mark belonging to Boord & Son, the company which subsequently appeared as opponents; and that there were other marks on the register that also showed cats. Before, however, the registrar finally refused he gave the applicants opportunity to apply for the consent of the opponent company, which consent was refused. The applicants appealed to the Chancery Division, and on November 6, 1912, Warrington J., holding that the reasons given by the registrar were not sufficient, ordered that the application should proceed. The comptroller therefore proceeded, and Messrs. Boord & Son appeared and opposed, asserting that the trade mark was calculated to deceive because it so nearly resembled their trade mark, which, substantially in the same form, had been several times registered. Their trade mark consisted of a barrel lying on its bilge, on top of which was a cat advancing in a somewhat aggressive attitude, with one paw raised in the air, and the words "Old Tom" on the barrel, with further lettering in a circular frame below. The comptroller proceeded to hear these objections and overruled them and gave leave to have the mark registered. From this decision the opponents appealed to the Chancery Division, and Neville J. on October 22, 1914, overruled the comptroller and held that the mark should not be registered; hence the present appeal.

A great number of declarations were filed on behalf of the opponents, the applicants, and of the opponents in reply. In numbers of these declarations not merely the same statements but even the same phraseology reappear. There is much that is argumentative and not evidential, and in the original declarations filed on behalf of the opponents there are statements of such breadth and generality as to show either trade ignorance or great rashness of affirmation and to weaken their weight as a whole. The material facts can, however, be summed up in a short compass.

"Old Tom" is a name for a kind of sweetened or cordialized gin, taking its name from a certain distiller, Mr. Thomas Chamberlain. One Joseph Boord, grandfather of Harry Percy Boord, one of the principal declarants, and a predecessor in business of the opponent company, thought of a play upon names and originated their trade mark, a tom cat being taken as a pictorial representation of Old Tom. This trade mark may even go back as far as 1849; at any rate it has been long established. It was registered on April 8, 1870, as having been used (it was said) for twenty-five years. The opponents' gin has a high reputation. There is a large trade in it at home and abroad. The mark is constantly spoken of either as the "Cat and Barrel" mark, or the "Cat" mark. The goods are known as "Cat and Barrel" or "Cat" goods, and the opponents as the "Cat and Barrel" or "Cat" people.

It is probable that, with the tendency to shortening expressions which is common in modern commerce, the phrase "Cat and Barrel" has been often latterly shortened into "Cat"; and numbers of people who support the opponents with their declarations go so far as to say that "Cat" and Boords are synonymous. Some even say that anywhere in the trade "Cat" means Boords and their goods, and that if any one else used a "Cat" mark he would be taking Boords' trade, or that they never heard of anybody else lawfully using a "Cat" for gin. These declarations, at any rate when made in respect of the home trade, are open to the serious criticism already indicated, as will be seen when the case on behalf of the applicants is stated.

With regard to the export trade to the East, there is a mass of evidence on the side of the opponents to the effect that, saving a few cases of counterfeit and a sale at Singapore of the goods of Messrs.

Burke (whose trade mark will be referred to), no gin with any form of "Cat" brand is known to be sold; and there is no positive evidence to the contrary for the applicants, except that, in a general way, it is proved that several firms having a "Cat" brand have an export trade. More weight might be attached to this evidence for the opponents if their declarations were not so inaccurate in respect to the home trade. But still, upon the evidence before us, it must be taken that the predominant gin trade in the East is in Boords' goods, which are sometimes known as "Cat and Barrel," but more often as merely "Cat."

Many of the declarants who testify on behalf of the opponents lay stress upon the fact that in Oriental countries, where the English language and even European characters are unknown, merchants and dealers go exclusively by the pictorial part of a mark. This is a fact which has been proved in other cases, as, for instance, in *Johnston* v. *Orr Ewing* (1), and no doubt should have weight. But when these declarants go further and say that the Oriental dealer will have his mind so impressed by the figure of the animal in the "Cat and Barrel" mark that a cat in any other setting will be for him the same, or a mere differentiation of brands,—the goods of the same trader—they make a large demand on the credulity or receptivity of the Court. If they were to say that there had been instances where two trade marks, each with a cat, had been confused, attention would have to be given to their statements; but as it is, their statements are mere theory. More might be said for them if the opponents' mark was a cat only, but when the mark is a cat and barrel, and the applicants' mark eliminates the barrel and adds the several items which have been already described, I am not prepared to accept the position that Orientals, even if impressed with the cat element, would mistake the two marks.

The applicants' evidence is to the following effect. Messrs. Kinahan & Co., Limited, of Dublin, their predecessors in business, though dealing principally in Irish whisky, had a trade in sweetened gin sold under a label which is identical with the proposed mark, and which can be traced back to about 1880. The mark has been registered in Belgium and Canada. The goods have been exported, and in considerable quantities. In 1888 a medal was awarded at the

(1) (1882) 7 App. Cas. 219, 231.

Exhibition at Melbourne to Messrs. Kinahan for their gin with this mark. The mark has been constantly in use, both at home and abroad, ever since, and no confusion has been experienced. Then in order to show that a cat is common to the trade they rely upon five other registered marks, those of Vaughan-Jones, Burkes, Anderson & Shaw, James Ainslie & Co., and Portal, Dingwall & Norris. The trade mark of Messrs. Ainslie was cancelled in 1913, since these proceedings began, and the circumstances are somewhat significant. An agreement was made on July 31, 1913, between the opponents and Messrs. Ainslie, which recited that the Ainslies had been requested as a matter of trade courtesy to cancel their registration. This they agreed to do, but they were to be entitled to the use in the United Kingdom only of the label, and their charges as between solicitor and client were to be paid by the opponents. On the other hand, they undertook not to describe their goods as "Cat Brand," or to assign, except in connection with the goodwill, any right to use a device containing a cat or cats for gin.

Anderson & Shaw's trade mark was cancelled about the same time, and in pursuance of a similar agreement. In this connection reference may be made to an action brought by the opponents on August 13, 1902, against one Huddart for infringing the opponents' trade mark by selling gin distilled by Melrose, Drover, Limited, using a trade mark representing a cat's head emerging from a barrel, which ended in a decision in favour of the opponents and a subsequent agreement between them and Melrose, Drover, Limited. It is remarkable that in the result Melrose, Drover, Limited, retained the cat in the same attitude, substituting a wall of bricks for the edge of the barrel—a mark which they have apparently used, and to the knowledge of the opponents, ever since.

In the course of the Huddart trial evidence was given showing that several labels having a cat, or portions of a cat, or more than one cat, as a principal feature, and including the label of the present applicants, were in use in this country, a fact the knowledge of which did not prevent the opponents from putting forward the broad and sweeping and very inaccurate declarations which were made by their witnesses.

In addition to their proof of the other registered marks, the applicants showed that there were four distillers who had been carrying on

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business for a long time, using marks containing as their principal features the whole or part of a cat. In connection with one of these —Wright & Gregg—it is to be noticed that at one time they had a cat sitting on the barrel, the barrel being on end, and that on October 29, 1907, they admitted that there was an infringement of the opponents' trade mark and discontinued theirs; but the discontinuance consisted in removing the barrel and leaving the cat. Then a very great number of proprietary labels and stock labels, having for their principal feature sometimes a cat, more often a cat's head and forepaws, sometimes more than one cat, were proved.

Colefax, K.C., and *Hunter Gray*, for the appellants, referred to *Boord & Son* v. *Thom & Cameron* (1); *In re Bagots, Hutton & Co.'s Application* (2); *In re Lyle and Kinahan, Limited's Application* (3); *Johnston* v. *Orr Ewing* (4); *In re Dexter's Application.* (5)

A. J. Walter, K.C., and *Sebastian*, for the respondents, cited *Johnston* v. *Orr Ewing* (6); *Eno* v. *Dunn* (7); *Seixo* v. *Provezende* (8); *Wilkinson* v. *Griffith Brothers & Co.* (9); *Reid Brothers* v. *Richardson & Co.* (10); *Dunnachie* v. *Young & Sons* (11); *Lever* v. *Goodwin.* (12)

Austen-Cartmell, for the registrar, referred to *In re Bagots, Hutton & Co.'s Application* (13); *In re W. & G. du Cros's Application* (14); *In re Dewhirst's Application.* (15)

Colefax, K.C., in reply, cited *In re Gutta Percha and India Rubber Co. of Toronto's Applications* (16); *In re Loftus' Trade Mark* (17); *Thomas Hubbuck & Sons* v. *William Brown, Sons & Co.* (18); *In re Trade Mark of La Société Anonyme des Verreries de L'Etoile* (19);

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(1) (1906) 23 Rep. Pat. Cas. 509.

(2) (1914) 31 Rep. Pat. Cas. 481.

(3) (1907) 24 Rep. Pat. Cas. 249.

(4) 7 App. Cas. 219, 227.

(5) (1893) 10 Rep. Pat. Cas. 269; [1893] 2 Ch. 262.

(6) 7 App. Cas. 219.

(7) (1890) 15 App. Cas. 252.

(8) (1866) L. R. 1 Ch. 192, 196.

(9) (1891) 8 Rep. Pat. Cas. 370.

(10) (1881) 45 L. T. 54.

(11) (1883) 10 R. 874.

(12) (1887) 4 Rep. Pat. Cas. 492; affirmed on appeal (1887) 36 Ch. D. 1.

(13) (1912) 29 Rep. Pat. Cas. 702.

(14) [1913] A. C. 624; 30 Rep. Pat. Cas. 660.

(15) (1896) 13 Rep. Pat. Cas. 288.

(16) [1909] 2 Ch. 10.

(17) [1894] 1 Ch. 193.

(18) (1900) 17 Rep. Pat. Cas. 148, 638.

(19) [1894] 2 Ch. 26.

In re Chemische Fabrik Greisheim Elektron Application (1); Kerly on Trade Marks, 4th ed. p. 274.

Cur. adv. vult.

March 31. PHILLIMORE L.J. read the first judgment, in which, after stating the facts as set out above, his Lordship continued: Without going into further details, the conclusion upon the evidence is as follows. For a long time "Old Tom" has been the trade name for sweetened or cordialized gin. The original idea of a tom cat was Mr. Boord's, but it was taken up generally by the trade; and as far as the evidence goes it is almost universal that the words "Old Tom" are backed up or enforced by a pictorial representation of a cat, or at least a cat's head. That is a device common to the trade, and no exclusive right to use it can be insisted upon. The applicants have bona fide used that trade mark for a great number of years. Our own eyesight tells us that the two marks are widely different. Their use without confusion hitherto supports this view. This being so, the case for the opponents must be rested on this one ground alone—that in Eastern countries the figure of a cat has made such an impression upon the native merchants that they are accustomed to speak of, and order the goods as, "Cat" goods, and that they may possibly get served in the first instance with the applicants' goods, if the agent or exporter to whom they apply is careless in the matter, and will have therefore to learn to amplify their description by returning to the phrase "Cat and Barrel." It is barely possible that some Oriental dealers may have been so impressed by the cat that they might think that the applicants' mark was only a differentiation of brand, and that they were still buying the opponents' (Boords') goods. But for such a bare possibility we are not to deprive people who have honestly used a mark for so many years, both at home and abroad, of such privileges as registration gives. This bare possibility does not make the mark one "calculated to deceive."

There is a passage in the judgment of Wright J. in *In re Dexter's Application* (2) which is much to the purpose: "I do not think that the comptroller was bound to refuse the registration merely because some person or many persons might be misled into thinking Dexter's tobacco was Wills's tobacco, if the grounds on which they were

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(1) (1910) 27 Rep. Pat. Cas. 201.

(2) [1893] 2 Ch. 262, 268.

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misled were grounds on which Messrs. Wills had no right to protect themselves—that is to say, if they were misled merely because a multitude of persons had by habit, and without any reason, associated the word 'Star' with the name of Wills. I think there must be something approximating to a right to use the word 'Star' to enable them to complain on that ground." I would also refer to the following passage from the judgment of Lord Selborne L.C. in *Johnston* v. *Orr Ewing* (1): "Your Lordships are not called upon to decide whether a ticket, which was a rightful and bona fide trade-mark of the trader using it, could be excluded by injunction from particular markets (though unimpeachable everywhere else) merely because in those markets it might be liable to be called by a name which the mark of another trader had already acquired there. To that proposition I should not myself, as at present advised, be prepared to assent." No doubt the considerations are not quite the same in a passing-off action. But, making all allowances, this passage is of importance.

In *In re Lyle and Kinahan, Limited's Application* (2) counsel for the opponents stated that so long as the applicants had confined their trade, which was a small one, to Ireland they had not interfered, but now they were extending their trade and contemplating establishing agencies abroad, which would interfere with the large and world-wide trade of the opponents. Upon this Lord Alverstone observed in his judgment as follows: "When once you get this, that from a period, which must be put at least as early as 1890, or some years before 1890, there had been a lawful use of the expression 'Kinahan's Whisky' in connection with the whisky manufactured by the respondents at Belfast, I think the difficulties in the way of opposing this registration are almost insuperable."

The ground of objection really comes to this: the opponents, not having the exclusive right to the cat, have accepted the description which their customers have bestowed and allowed their goods to be called "Cat" goods in lieu of "Cat and Barrel" goods. This does not give them any right which they did not otherwise possess to prevent the adoption of the device of a cat, it being a common device used by other manufacturers.

The decision of Neville J. against the registration was not so much

(1) 7 App. Cas. 219, 227. (2) 24 Rep. Pat. Cas. 249, 258.

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founded on the rights of the opponents as upon the supposed interest of the public. Neville J. thought that he had not got to decide whether or not a cat was a mark common to the trade. Having said this, he proceeded to consider that which seems immaterial, whether, notwithstanding that a cat is common to the trade, one firm might nevertheless acquire the exclusive title to the trade name "Cat Brand." Then, referring to s. 39 of the Act, he held that it made no difference that there were, as he said, three "Cat" trade marks on the register (meaning those of the opponents, Burkes, and Vaughan-Jones). Finally his conclusion is thus expressed: "Upon the whole I come to the conclusion that this mark ought not to be registered, and I come to that conclusion, whether the opponents are the exclusive owners of the name 'Cat Brand' or not, for this reason, that I think it would be wrong to register a label the distinguishing feature of which is an animal or a word or a name which is common to the whole trade, because it would be throwing the ægis of the Court and of the register over, and enable him to set up a claim to an exclusive right to what is the common right of all dealers in the article in question, and a fortiori if I think, as I do, upon the evidence here that the opponents are very widely known throughout the trade, and probably exclusively known in India as the owners of the 'Cat Brand' I should be doing not only a wrong to the public but an injustice to the opponents themselves if I allowed this mark to be registered." But the applicants are not seeking "to set up a claim to an exclusive right to what is the common right of all dealers." Their case is that the cat is common to the trade. They have disclaimed any claim to a cat as their mark. What they claim is their particular cat—a puss in boots—with all the adjuncts already mentioned. The registration of their mark therefore will do no injury to the public. Again the learned judge says that he cannot decide, and has not evidence to enable him to decide, whether the cat is common to the trade or not. But till that is decided it is not possible to say whether any injustice will be done to the opponents by the registration of the applicants' design.

If the opponents have not otherwise the right to exclude all other manufacturers (or all other manufacturers but Burkes and Vaughan-Jones under the three-mark rule or s. 39) from using a cat as part of a trade mark for gin, they cannot confer upon themselves that right

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because they have accepted for their goods the appellation "Cat" goods or "Cat" brand. They may, or may not, be entitled (as Neville J. seems to think they may be) to the exclusive use of the word "Cat" goods or "Cat" brand; and they will always be able (registration or no registration) to restrain other dealers from passing off other goods as theirs. With this they must be content.

Moreover, if the true effect of the evidence be (as I think) that at the most these names are their names in the Eastern market, their case is weaker. We are not to refuse a trader who has used a mark honestly for twenty-five years the right to register it because, though the two marks are quite distinctive, the goods of another dealer have acquired in some markets a name so general that it might fit the trade mark of either.

It has been suggested that we have the power under s. 21 of the Act to order such a limitation to be entered upon the register as would prevent the use by the applicants of their trade mark in the East. On the other hand it has been submitted that we have no such power. This is a point which I do not propose to decide, because, assuming that we have the power, I do not think that this is a case for exercising it.

In my view the applicants are entitled to have their trade mark registered, and I so decide.

LORD COZENS-HARDY M.R. I agree. I only desire to add a few words as to the procedure adopted in these trade mark cases. It seems to me to be worse than the practice of the old Court of Chancery. Here we have more than one hundred declarations, many of them obviously in common form. There has been no cross-examination, although it is certain that a few questions in cross-examination would have shown that many of them were worthless. The cost of all this evidence is shocking, but I do not suppose that is a consideration which greatly troubles either of the parties in this case. Much more important is the consideration that the Court is asked to decide questions of disputed facts without any firm foothold. Speaking for myself, I mistrust all these declarations not tested by cross-examination.

JOYCE J. The most prominent (I may say the only noticeable) feature in the trade mark which the appellants, who are the applicants, desire to register is a fantastic representation of an animal which most people, I suppose, would at once recognize as the puss in boots of the old fairy tale. The animal is a cat, but distinguishable and quite distinct from all the other cats or parts of cats on any trade mark that is upon the register or that have been used —and many are in common use—in connection with the sale of sweetened gin popularly called " Old Tom."

The question to be determined is whether this mark in all the circumstances of the case is calculated to deceive within s. 9 of the Act.

Now, as Swinfen Eady J. held in *Boord & Son* v. *Huddart* (1), and as appears by the evidence in the present case, I think that the use of a device of or containing a cat is common in the trade. No one has a monopoly of its use in connection with the sale of sweetened gin. It is alleged, however, that the goods of the opponents have become known by a name—" Cat " (more properly " Cat and Barrel ") brand, derived from their somewhat remarkable trade mark of a cat in a rather striking attitude upon a barrel—and that the mark of the applicants so resembles that of the opponents as to be calculated to deceive, because its use would, it is said, be likely to suggest the use of the name " Cat Brand " for the goods of the applicants upon which it may be placed. I do not consider this to be proved. As a matter of fact the mark of the applicants has been used by them or their predecessors for upwards of twenty-five years—and many other persons have used what I may call " Cat " marks for gin—without any case of deception or confusion having arisen so far as appears.

If our inquiries be confined to the United Kingdom, and generally to people acquainted with the English language, I cannot see any possibility of confusion arising from the use of the mark which the applicants seek to register.

And notwithstanding the evidence of the opponents with respect to their trade in India and the East, it must on the other hand be borne in mind that the applicants or their predecessors have also had an export trade. They have used the mark in question in connection with their goods so exported, and other firms, notably Burkes, in their foreign trade in gin have used a trade mark containing the device of a cat, much more unmistakable than the applicants' puss in boots, and my examination of the evidence on behalf of the opponents, much of which is open to a good deal of criticism, and without surrendering my own judgment—to use Lord Macnaghten's phrase—I come to the conclusion that, although it may not be absolutely impossible, it is highly improbable that the use of the trade mark of the applicants will lead to any deception or confusion. In other words, I do not consider it to be calculated to deceive.

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(1) (1903) 21 Rep. Pat. Cas. 149.

The opponents have no monopoly in the use either in their home or export trade of the designation of "Old Tom" for gin or of the device of a cat, although no doubt they are exclusively entitled to their special device of a cat and barrel. Use of the device of a mere cat alone or in combination with other things being publici juris in the trade (not only here but also, I think, abroad, not excluding India and the East), I cannot hold that the existence of the mark of the opponents disentitles the applicants to have registration of their mark of puss in boots.

Upon the whole, therefore, I think that, following Wright J.'s decision in *In re Dexter's Application* (1), this appeal should be allowed, the applicants, as they are willing to do, giving the disclaimer which the comptroller ordered, as I understand, or which they agreed to before the comptroller. Therefore on the whole I think this appeal ought to be allowed. I desire to add that I entirely agree with the observations which have fallen from the Master of the Rolls with reference not only to the evidence in this case but in other cases, many of which it has been my fortune, good or bad, to hear.

PHILLIMORE L.J. I should like to add that I entirely concur with the observations the Master of the Rolls has made as to the practice in this class of case.

Solicitors for appellants: *John Bartlett & Sons.*
Solicitors for respondents: *Halse, Trustram & Co.*

(1) [1893] 2 Ch. 262.

H. C. R.

In re NEW CHINESE ANTIMONY COMPANY, LIMITED.

NEVILLE J.

1916

April 11.

[0081 of 1916.]

Company—Winding up—Arrears of Preferential Dividends—Direction to pay out of Surplus Assets—No Dividends declared—To what Extent Arrears payable.

Followed. *In re* WHARFEDALE BREWERY CO. LD. [1952] 1 Ch. 913

A company's capital included 15,000 preference shares of 1*l.* each on which 15*s.* 6*d.* only had been paid. The preference shareholders were entitled to a cumulative preferential dividend of 10 per cent. per annum on the amount paid up on their shares, and in a winding up to have the surplus assets applied, first, in paying off their capital; secondly, in paying the arrears (if any) of the preferential dividend to the commencement of the winding up, and to have the residue, after payment of the capital of the ordinary shares, divided between the ordinary and preference shareholders in proportion to the amount paid up on their shares.

The articles of association provided that no dividends should be declared except out of profits. No dividends had ever been declared, and the last balance-sheet of the company, issued in September, 1914, showed a loss on profit and loss account to date of 9000*l.* The company went into voluntary liquidation on September 3, 1915. The company held a large stock of antimony, and this had so risen in price that the surplus assets were sufficient to cover the loss, pay all arrears of preferential dividends, and a dividend upon the ordinary shares. The liquidator took out this summons for directions how the surplus assets were to be divided:—

Held, that the arrears of preferential dividends payable could not be limited to dividends actually declared, and the holders of preference shares were entitled to be paid preferentially out of the surplus assets 10 per cent. per annum on the amount paid up on their shares from the date of their issue to the commencement of the winding up.

Semble, it would have made no difference if the surplus assets had not included any profits, but as there plainly were profits the point did not arise.

In re W. J. Hall & Co. [1909] 1 Ch. 521 discussed and (on the second point) not followed.

THE New Chinese Antimony Company, Limited, was incorporated under the Companies (Consolidation) Act, 1908 (8 Edw. 7, c. 69), on March 2, 1911, with a capital which, after reduction and increase effected by resolutions duly passed and confirmed on the occasion of a reorganization scheme carried out at the beginning of 1914, consisted of 16,250*l.* divided into 15,000 preference shares of 1*l.* each and 25,000 ordinary shares of 1*s.* each.

The rights of the preference shares as defined by the special resolution for their creation passed and confirmed on November 1 and 18, 1912, were as follows:—

"(*a*) The holders of such preference shares shall be entitled to receive out of the profits of the company a cumulative preferential dividend at the rate of 10 per cent. per annum on the capital paid up thereon.

"(*b*) Whenever the profits of the company in respect of any year shall be more than sufficient to pay the preferential dividend aforesaid, the holders of the preference shares shall be entitled to 50 per cent. of the surplus.

"(*c*) In the event of the winding up of the company the holders of the preference shares shall be entitled to have the surplus assets applied, first, in paying off the capital paid up on the preference shares held by them respectively, secondly in paying off the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding up, and the remainder after payment off of the capital paid up on the ordinary shares shall be divided between the preferred ordinary shares in proportion to the amount paid up on them."

The articles of association provided that no dividend should be payable except out of the profits of the company.

No dividends had ever been paid by the company on the preference or other shares, and their last balance-sheet, which was made up on September 30, 1914, showed a loss on profit and loss account to date of 9000*l.*, though for the year ending on that date it showed a profit of 27*l.*

Resolutions for the voluntary winding up of the company were duly passed and confirmed on August 16 and September 3, 1915, and a liquidator was appointed. At this date 15*s.* 6*d.* had been paid up on each of the 15,000 preference shares of 1*l.* each, and the 25,000 ordinary shares of 1*s.* each had been paid in full. There was not, and there never had been, any class of shares in the company designated "preferred ordinary shares." All parties agreed that this phrase was a slip in the resolution, and the judge decided that on the true construction of the resolution the ultimate residue of the assets was divisible between the preferred and ordinary shareholders.

At the date of the winding up the company held large stocks of antimony, which had increased so much in value since the purchase by the company that if they had been brought into the profit and loss account on that date, which for reasons connected with the war it was impossible to do, the account would have shown a profit sufficient to have paid the cumulative dividend on the preference shares, including arrears, and paid a dividend upon the ordinary shares. Increased profits had been earned by realization of the said stocks since the commencement of the winding up.

This summons was taken out by the liquidator for the determination of the questions (1.) whether the sum representing the undistributed net profits of the company at the commencement of the winding up ought to be applied by way of dividend amongst the shareholders of the company, and in what shares or proportions; and (2.) upon what principles as between the holders of the fully-paid ordinary shares of 1*s.* and the holders of preference shares of 1*l.* with 15*s.* 6*d.* paid up the surplus assets of the company, after satisfying all the liabilities of the company, providing for the costs of the winding up, and paying such sums, if any, as the Court might determine, ought to be distributed by way of dividend out of the undivided profits of the company.

H. E. Wright, for the liquidator.

Whinney, for the ordinary shareholders. In *In re W. J. Hall & Co.* (1) Swinfen Eady J. decided that, though in a case like this arrears of preferential dividends could not be confined to dividends actually declared, they could not be paid unless it were shown that there had been profits. The same principle is stated by Lindley L.J. in *In re Armitage* (2): "The moment the company got into liquidation there was an end of all power of declaring dividends and of equalizing dividends, and the only thing that the liquidator had to do was to turn the assets into money, and divide the money among the shareholders in proportion to their shares." The question in that case was whether a surplus over the nominal amount of shares paid to shareholders on winding up was income or capital, but the principle applies here. The

(1) [1909] 1 Ch. 521.

(2) [1893] 3 Ch. 337, 346.

last balance-sheet issued by the company showed a loss. The company went into liquidation before the end of the financial year, and the company could not after that declare dividends or declare that profits had been made. They had put themselves into the position of having only one fund which is capital and not arrears of profits or dividends, and Swinfen Eady J.'s decision applies.

Owen Thompson, for the preference shareholders, was not called upon.

NEVILLE J. In this case the company had, by virtue of their articles of association as amended by special resolutions, preference and ordinary shares. The rights of the preference shares are determined by the special resolution under which they were issued. [His Lordship read clauses (*a*), (*b*), and (*c*) and continued :] The meaning of those words is to my mind perfectly clear. We have to deal with a fund which is not capital, or income, or profits, but surplus assets. That is what we have to distribute. There is nothing to make any distinction between capital and income. The only point is what is meant by "arrears of the preferential dividend aforesaid." Arrears of dividend might mean only arrears of dividends which had been declared. But I do not think that is what the words do mean. The clause, in my opinion, means that in the case of a winding up the preference shareholders are to have their capital repaid in full and also the cumulative preference dividend of 10 per cent., that is to say, the amount they would have had if there had been profits enough to enable the company to declare dividends. On that point I am supported by the opinion of Swinfen Eady J. in *In re W. J. Hall & Co.* (1) so far as concerns the suggested limitation of the dividends to declared dividends. In that case Swinfen Eady J. went on to decide that there could be no arrears of dividends payable except so far as there had been profits. With all deference I fail to follow that part of the decision, but it does not apply to this case. I am dealing with the division of surplus assets, not with the declaration of a dividend. I cannot see that it makes any difference whether there are profits or not. But it is plain in this case that there are abundant profits,

(1) [1909] 1 Ch. 521.

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and the case of *In re W. J. Hall & Co.* (1), though similar, is distinguishable and is not binding on me so far as the payment of arrears of cumulative preferential dividends out of profits is concerned. The company did not know when the accounts were taken in September, 1914, that the great rise in the price of antimony would take place, and so thought themselves bound to show a loss. It would be quite easy to show that there had in fact been a large profit, but, as I said before, I do not think it necessary, for we are only dealing with surplus assets.

The COURT made a declaration (1.) that nothing ought to be distributed by way of dividend among the shareholders of the company; (2.) that, on the proper construction of the special resolution creating the preferred shares, the surplus assets ought to be applied, first, in repaying the capital paid up on the preference shares; secondly, in paying to the preference shareholders 10 per cent. cumulatively on their shares from the date of issue to the commencement of the winding up; thirdly, the balance, after repaying the capital paid up on the ordinary shares, ought to be distributed pro rata between the preference and ordinary shareholders in proportion to the amount paid up on their shares respectively. The costs of all parties were ordered to be paid out of the assets.

Solicitors: *Sayer, Ledgard & Smith, for L. H. Booth, Newcastle-upon-Tyne.*

(1) [1909] 1 Ch. 521.

J. R. B.

ASTBURY J.
1916
Feb. 28, 29 ;
March 6, 7, 8,
17.

SCHWANN *v.* COTTON.

[1914 S. 3130.]

Easement — Water — Underground Pipe — Severance of two Tenements —Appurtenances—Continuous and "Apparent" Easement—Implied Grant as between the two Tenements—Water conducted from Well on Stranger's Tenement — Well fed by Percolation — No Grant from Stranger—Twenty Years' Enjoyment—Clam—Precario—Jus tertii.

By his will made in 1898 a testator who died in 1902 devised Blackacre and the appurtenances to the plaintiff's predecessors in title, and Whiteacre and the appurtenances to the predecessor in title of the present owner, whose husband and gardener were the defendants.

Blackacre was supplied with water by an underground pipe leading from a stone well at Greenacre through Whiteacre. This pipe was openly laid by the testator in 1893, but there was no evidence as to what (if any) arrangement was made with the then owner of Greenacre. The supply was originally used for the house and garden of Blackacre, but after 1894 it was used for the garden only, though the house connection was still available.

The well was fed by percolation from some untraceable spring, and the supply was practically continuous. The well had long since been covered by a stone slab and sods, and when the present owner of Greenacre bought in 1912 he was unaware of the existence of the well or the pipe and was told there were no easements.

The present owner of Whiteacre purchased in 1913 without notice of the existence of the pipe or any easement. In 1914 a new carriage drive was made through Whiteacre, and the pipe being then discovered and found to be in the way, the defendants, as agents of the owner, who was abroad, cut and removed part of it and stopped the flow of water, whereupon the plaintiff brought an action for an injunction :—

Held, that the pipe and pipe easement under Whiteacre being continuous, and being also apparent to the testator in 1902 though invisible in Whiteacre, passed by the devise of Blackacre to the plaintiff's predecessors either as appurtenances of Blackacre or by implied grant on the severance of the two tenements.

Nicholas v. *Chamberlain* (1606) Cro. Jac. 121 and *Watts* v. *Kelson* (1871) L. R. 6 Ch. 166 applied.

Held, also, that this pipe easement, not being determinable at the will of the owner of the alleged servient tenement Whiteacre, was not precarious as between the owners of Blackacre and Whiteacre and was therefore capable of creation by implied grant.

Burrows v. *Lang* [1901] 2 Ch. 502 distinguished.

Held, also, that the defendants were not entitled to rely on an alleged jus tertii in the owner of Greenacre to stop the water on the ground that the enjoyment against him had been clam, and that his well was only fed by percolating water.

Held, also, that, even if the defendants had been entitled to rely on that alleged jus tertii, they had failed to establish it, as prima facie and as far as the defendants were concerned (*a*) the twenty years' enjoyment of the water, though not known to the present owner of Greenacre, was known to his predecessor in 1893 and was therefore not clam: *Dalton* v. *Angus* (1881) 6 App. Cas. 740, 767, 789; and (*b*) the mere fact that the artificial and apparently permanent stone well was fed by percolation did not necessarily prevent the acquisition of an easement to take water from that well.

Race v. *Ward* (1855) 4 E. & B. 702 applied; *Bradford Corporation* v. *Ferrand* [1902] 2 Ch. 655 distinguished.

WITNESS ACTION.

By his will dated July 21, 1898, a testator who was the owner of two adjoining properties at Freshwater known as Braxton Cottage and Malta Cottage, with the gardens and fields respectively attached thereto, devised Braxton Cottage and the appurtenances to the predecessors in title of the plaintiff and his lessor and Malta Cottage and the appurtenances to the predecessor in title of the present owner, whose husband and gardener were the defendants.

The testator died on April 5, 1902. At that time Braxton was partly supplied with water by an underground pipe leading from a well in an orchard now belonging to one Nugent. This pipe was openly laid by the testator in 1893 at the request of an incoming tenant of Braxton, but there was no evidence as to what (if any) arrangement was made with Nugent's predecessor in title, or who he was. The pipe was carried from the well under the orchard grounds, then under a high road, and then under the grounds of Malta to Braxton. It was connected with a cistern on the first floor of Braxton Cottage and with two standpipes in Braxton garden. An analysis of the water proving satisfactory, it was at first used for the house and garden, but in 1894 the tenant obtained a house supply from the local waterworks, and the supply from the well was only used for the garden, though the connection with the house still remained and could be turned on at any time.

Until the defendants' interference in 1914 the pipe had remained unaltered and undisturbed, and the occupiers of Braxton had enjoyed a continuous supply of water through it. With the exception of one or possibly two dry summers, when there was some temporary deficiency, the supply, though not very copious, had been sufficient for daily garden use by hose or otherwise during all periods of the year.

The well was a round dug well six feet deep by three feet in diameter. It was lined with uncemented stone blocks at the bottom and sides. The evidence showed that it was obviously spring-fed, though not where the spring was or how the water was collected in the well, but for the purposes of the case the Court assumed that it was collected by percolation through the bottom and sides. In 1893 it was an old open well, and the intake pipe was led into it three and a half feet from the bottom. The work was done quite openly and without any concealment. The underground pipe was of course invisible, but the intake was visible and apparent in the well. Apart from a certain amount of mud that had collected at the bottom in the course of years the water was still good and clear.

The well and orchard now belonged to Nugent, who bought the property from Lee on July 13, 1912. The well had been covered up with a stone slab and sods by some previous owner and had become covered with grass, so that Nugent had no notice of the existence either of the well or the pipe, and in answer to the usual requisition as to easements he was informed that his vendor was not aware of any.

On January 31, 1913, the wife of the defendant Cotton purchased Malta for 2000*l.* without any notice of the existence of the pipe or any easement.

In 1914 a new carriage drive was made through Malta. The pipe being discovered and found to be in the way, the defendant Hayles, the gardener, by the direction of the defendant Cotton acting as agent for his wife, who was abroad, cut and removed part of the pipe and stopped the flow of water. At the time of this cutting the defendants had become aware of the plaintiff's claim.

On November 3, 1914, after some preliminary correspondence, the plaintiff commenced this action for an injunction and damages.

On December 4, 1914, the defendants were restrained until judgment or further order from cutting, removing, or otherwise interfering with the pipe and were ordered to restore and make it good. The pipe was then restored and carried under the drive, and the flow was again satisfactory. The action now came on for trial.

Micklem, *K.C.*, and *A. F. Topham*, for the plaintiff. On the severance of Braxton and Malta in 1902 the pipe and pipe easement passed to the devisees of Braxton either as "appurtenances"—*Nicholas* v. *Chamberlain* (1)—or by implied grant: *Watts* v. *Kelson* (2); *Bayley* v. *Great Western Ry. Co.* (3); *Pearson* v. *Spencer* (4); *Phillips* v. *Low* (5); *Ewart* v. *Cochrane.* (6)

Hon. Frank Russell, *K.C.*, and *Greenwood*, for the defendant Cotton. The word "appurtenances" has a strict legal meaning and does not pass a quasi-easement: *Bolton* v. *Bolton* (7); *Daniel* v. *Anderson* (8); *Whalley* v. *Tompson* (9); *Pheysey* v. *Vicary* (10); *Worthington* v. *Gimson* (11); *In re Peck and London School Board* (12); unless in special circumstances it is given the secondary meaning of "easements and rights usually occupied and enjoyed" with the premises: *Thomas* v. *Owen.* (13)

Secondly, the devise did not operate as an implied grant of a new legal right. Such a grant is only implied (*a*) if the quasi-easement is continuous and apparent, or (*b*) if it is an easement of necessity: Gale on Easements, 8th ed. p. 111; *Wheeldon* v. *Burrows* (14); *Watts* v. *Kelson* (15); and the easement must of course be one known to the law. In *Watts* v. *Kelson* (15) the water system was continuous and apparent and the grantor retained the servient tenement. In *Bayley* v. *Great Western Ry. Co.* (3), *Thomas* v. *Owen* (16), and *Kay* v. *Oxley* (17) there was an open and visible roadway which was a continuous and apparent easement, whereas in *In re Peck and London School Board* (1) there was merely a piece of waste ground, so that the alleged way was discontinuous. At the time of the devise in the present case the pipe was invisible in Malta, and the water right was precarious against the owner of the well. There was therefore no implied grant of any pipe easement through Malta.

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(1) Cro. Jac. 121.

(2) L. R. 6 Ch. 166, 173.

(3) (1884) 26 Ch. D. 434.

(4) (1861) 1 B. & S. 571; (1863) 3 B. & S. 761.

(5) [1892] 1 Ch. 47.

(6) (1861) 4 Macq. 117.

(7) (1879) 11 Ch. D. 968.

(8) (1862) 10 W. R. 366.

(9) (1799) 1 Bos. & P. 371.

(10) (1847) 16 M. & W. 484.

(11) (1860) 2 E. & E. 618.

(12) [1893] 2 Ch. 315, 319.

(13) (1887) 20 Q. B. D. 225, 231.

(14) (1879) 12 Ch. D. 31.

(15) L. R. 6 Ch. 166.

(16) 20 Q. B. D. 225.

(17) (1875) L. R. 10 Q. B. 360.

Thirdly, the right to the water is obviously precarious. No grant from any of Nugent's predecessors has been produced, and the enjoyment during the latter part of the twenty years since 1893 has been clam. There is nothing, therefore, to prevent Nugent stopping the flow from the well: *Union Lighterage Co.* v. *London Graving Dock Co.* (2) Even if the enjoyment had not been clam, there is the fact that the well is only fed by water percolating from an unascertained spring or otherwise. That percolating water could be intercepted by Nugent or any other landowner before it reached the well: *Chasemore* v. *Richards* (3); *Bradford Corporation* v. *Ferrand* (4); *New River Co.* v. *Johnson.* (5) Now an easement the continuance of which depends wholly on the will of a third person is precarious and unknown to the law: *Burrows* v. *Lang.* (6) The enjoyment was equally precarious in 1902, and the quasi-easement being unknown to the law formed no subject-matter for implied grant or prescription.

Giveen, for the defendant Hayles. The crucial date is the testator's death in 1902. At that time he had enjoyed the well water for nine years through his own property Malta. His potentiality of acquiring an easement in eleven years' time was not a right or easement known to the law: *Greenhalgh* v. *Brindley.* (7) The doctrine of implied grant on the severance of two tenements has never been applied to a mere potentiality like this. It would imply that the testator intended to subject Malta to the burden of a pipe preventing building and development in order to give the owner of Braxton the off-chance of acquiring an easement in eleven years against the owner of the well. That cannot have been the testator's intention.

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(1) [1893] 2 Ch. 315.

(2) [1901] 2 Ch. 300; [1902] 2 Ch. 557.

(3) (1859) 7 H. L. C. 349.

(4) [1902] 2 Ch. 655.

(5) (1860) 8 W. R. 179.

(6) [1901] 2 Ch. 502.

(7) [1901] 2 Ch. 324.

Again, the principle of prescription is twenty years' acquiescence by the owners of the servient tenement. No right has therefore been acquired against Nugent, who cannot be deemed to have acquiesced in a clam enjoyment of which he was wholly unaware: *Dalton* v. *Angus*. (1)

Micklem, K.C., in reply. There is an obvious distinction between discontinuous easements like rights of way and continuous easements such as pipes or watercourses. The latter pass on a severance by implication of law; the former require an expression of intention: *Polden* v. *Bastard*. (2) This is a continuous easement, and the *Bolton* v. *Bolton* (3) line of cases on rights of way are irrelevant. The pipe was really part of Braxton Cottage, and the case is far more analogous to *Nicholas* v. *Chamberlain* (4) and *Goodhart* v. *Hyett*. (5)

It is contended that the pipe easement was not "apparent." But in English law an easement need not be "apparent": *Dalton* v. *Angus* (6); at all events in the sense of "visible": *Pyer* v. *Carter*. (7) This easement was, however, obviously apparent to the owners of Braxton, Malta, and the well in 1893 and to the testator in 1902. That is quite sufficient if apparency is necessary: *Dalton* v. *Angus*. (8)

It is then contended that the easement is precarious against Nugent. That, if it be a fact, is absolutely immaterial. The defendants cannot rely on a jus tertii: Pollock on Torts, 10th ed. p. 387. The plaintiff and his predecessors have, however, had twenty years' enjoyment of the water from the well. The enjoyment was perfectly open in 1893 and known to Nugent's predecessors. The fact that one of them covered up the well does not make the subsequent enjoyment clam: *Dalton* v. *Angus*. (8) The right to take water from a well being an easement—*Race* v. *Ward* (9)—the twenty years' enjoyment prima facie gives the plaintiff a right by prescription or implied grant, and the burden is on the defendants to show that the right was only enjoyed by licence or was otherwise incapable of prescription. In *Bradford Corporation* v. *Ferrand* (1) there was no question of grant or prescription, but only of natural rights. If the plaintiff has obtained a right to the water by implied grant or prescription which is equivalent to a lost grant, Nugent could not stop the water percolating into the well. That would be a clear derogation from the grant.

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(1) 6 App. Cas. 740, 760, 774, 787, 801, 827.

(2) (1865) L. R. 1 Q. B. 156, 161.

(3) 11 Ch. D. 968.

(4) Cro. Jac. 121.

(5) (1883) 25 Ch. D. 182.

(6) 6 App. Cas. 821.

(7) (1857) 1 H. & N. 916, 922.

(8) 6 App. Cas. 767, 789.

(9) 4 E. & B. 702.

The defendants then treat the case as if Nugent's predecessor had created an artificial watercourse for his own benefit to discharge water through Malta and Braxton. In that case they say the plaintiff can have acquired no right to compel Nugent to continue the flow. It is true in such a case that no right can be acquired against the creator of the watercourse, but a right may be acquired against an intermediate owner: see observations of Lord Abinger C.B. in *Arkwright* v. *Gell.* (2) In *Wood* v. *Waud* (3) the intermediate proprietors of an artificial watercourse, though not liable under the third count for diverting the water for ordinary uses, were held liable under the same count for abstracting more than a proper amount. In the present case the defendants are guilty of a total abstraction. In *Burrows* v. *Lang* (4) the right was claimed against the creator of a temporary artificial watercourse made for his own purposes and lying entirely on his own land though abutting on the plaintiff's land. That claim naturally failed. The decision has no bearing on the present case, where the claim is against an intermediate proprietor.

Cur. adv. vult.

March 17. ASTBURY J. (after stating the facts). The plaintiff contends that under the devise of " Braxton and the appurtenances " the devisees and their successors in title became entitled to the house and its said water supply pipe as then existing and to an easement for the pipe through the grounds of Malta, as against the devisee thereof and his successors in title, and he alleges that the acts of the defendants complained of, and which were admittedly done on behalf of the present owner of Malta, were wrongful as a derogation from the testator's grant to his (the plaintiff's) predecessors in title.

(1) [1902] 2 Ch. 655.
(2) (1839) 5 M. & W. 203, 233.
(3) (1849) 3 Ex. 748, 779—781.
(4) [1901] 2 Ch. 502.

As a general rule a grantee of land is entitled by implied grant to any easement in the land of his grantor which is necessary to render the land as granted capable of enjoyment: see *Pomfret* v. *Ricroft*. (1) When an owner of land who has been in the habit of using continuous quasi-easements in his own soil during unity of ownership conveys to a purchaser that portion of his land for the beneficial occupation of which he has been in the habit of using them—or reserves that portion, granting to a purchaser the quasi-servient tenement—the question has been discussed in many cases whether he grants or reserves a right to those easements by implication, if no general words are used in the conveyance which definitely and expressly operate as a grant or reservation of those newly created legal rights. With the question of reservation I have no concern in this case, the question I have to decide depending upon direct grant express or implied.

In *Polden* v. *Bastard* (2) Erle C.J., in delivering the unanimous judgment of the Exchequer Chamber, said: "There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognise this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass."

In *Pearson* v. *Spencer* (3) Blackburn J., delivering the judgment of the Court of Queen's Bench, said: "We do not think that, on a severance of two tenements, any right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to shew an intention to create the right to use these ways de novo. We agree with what is said in *Worthington* v. *Gimson* (4), that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way; and *Pheysey* v.

(1) (1669) 1 Wms. Saund. 321, 323.

(2) L. R. 1 Q. B. 156, 161.

(3) 1 B. & S. 571, 583.

(4) 2 E. & E. 618.

Vicary (1) is an authority that the same rule in this respect applies to a will as to a deed."

The right claimed in this case is to a continuous easement, if not to an easement of quasi-necessity, and I am not therefore concerned to any great extent with authorities on rights of way generally, but the above distinction between continuous and non-continuous easements has more recently been considerably modified in favour of implying grants on severance even of non-continuous easements under special circumstances: see for example *Thomas* v. *Owen* (2), where Fry L.J., delivering the judgment of the Court of Appeal, said: "No doubt the word 'appurtenances' is not apt for the creation of a new right, and the word 'appurtenant' is not apt to describe a right which had never previously existed; and therefore the mere grant of all appurtenances or of all ways appurtenant to the principal subject of the grant has been held in many cases not to create a new right of way where the right was not pre-existing at the date of the grant. But from as long ago as the fourth year of Philip and Mary (*Hill* v. *Grange* (3)) the word 'appurtenances' has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.' . . . . This conclusion is, we think, aided by sufficient authority. For which purpose it will suffice to refer to the cases of *Nicholas* v. *Chamberlain* (4), *Hall* v. *Lund* (5), and *Ewart* v. *Cochrane*." (6) See also *Bayley* v. *Great Western Ry. Co.* (7), which I will refer to more particularly in a moment.

In *Nicholas* v. *Chamberlain* (4) it was held upon demurrer that "if one erects a house, and builds a conduit thereto in another part of his land, and conveys water by pipes to the house, and afterward sells the house with the appurtenances, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house; because it is necessary and quasi appendant thereunto; and he shall have liberty by law to dig in the land for amending the pipes, or making them new as the case require." On the question of implied grant I am not aware that this decision has ever been doubted.

(1) 16 M. & W. 484.
(2) 20 Q. B. D. 225, 231.
(3) (1556) Plowd. 164, 170.
(4) Cro. Jac. 121.
(5) (1863) 1 H. & C. 676.
(6) 4 Macq. 117.
(7) 26 Ch. D. 434.

In *Wheeldon* v. *Burrows* (1) James L.J. said that "in the case of *Nicholas* v. *Chamberlain* (2) the Court seems to have really proceeded on the ground that it was not an incorporeal easement, but that the whole of the conduit through which the water ran was a corporeal part of the house, just as in any old city there are cellars projecting under other houses. They thought it was not merely the right to the passage of water, but that the conduit itself passed as part of the house, just like a flue passing through another man's house."

In *Ewart* v. *Cochrane* (3) the plaintiffs Cochrane, who were tanners and curriers, stated that they had acquired and been infeft in their tanyard with its parts and its pertinents and that they had consequently a right to use a certain drain or conduit leading from their works to a tank or cesspool situated in the garden of the defendants Ewart, who had obstructed it. It appeared that in 1788 the common owner had constructed the drain. In the same year he sold the garden to Murray and in 1806 he sold him the tanyard. In 1819 Murray conveyed the tanyard to Drynan, the plaintiffs' predecessor. Murray died in 1832 and his trustees conveyed the garden to McDowell, the defendants' predecessor. The plaintiffs having succeeded in the Court of Session, the defendants appealed. Lord Campbell L.C. said (4): "I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words in the conveyance. I do not know whether the usual words are essentially necessary; but where there are the usual words I cannot doubt that that is the law." Later on he said (5): "The grant"—by Murray to Drynan—"was of this tanyard 'and that as the whole said subjects are presently possessed by us,' and so on, together with all right title and interest, and so on, 'with the pertinents hereby disponed and inclosed as

(1) 12 Ch. D. 31, 60.

(2) Cro. Jac. 121.

(3) 4 Macq. 117.

(4) 4 Macq. 122.

(5) 4 Macq. 123.

aforesaid in all time coming.' Then as the subjects of the grant were then possessed, the tanyard along with this gutter to the hole was so enjoyed, and it was necessary for the reasonable enjoyment of the property. When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment of the property as it existed before the time of the grant. Then that being so it seems to me that this easement passed by the conveyance." Lord Chelmsford said (1): "The question arises whether by the conveyance to Drynan in 1819 he"—the grantor Murray—"did not impliedly convey to him that drain, the use and enjoyment of which, by the acts of the parties themselves, had been shown to be necessary to the enjoyment of the tanyard. I can come to no other conclusion than that it was essential to the enjoyment of the tanyard, and therefore that we must imply a grant to Drynan when the tanyard was conveyed to him in 1819."

In *Hall* v. *Lund* (2) it appeared that in 1855 Shaw, the owner in fee of two mills, leased one to Pullan, who carried on therein the business of a bleacher. The refuse from his works was discharged through a drain partly open and partly covered into a natural stream or watercourse 300 or 400 yards distant and upon which the other mill was situate. This polluted the stream. In 1858 Pullan surrendered his lease, and Shaw granted a new lease for eleven years to the defendant. In this lease the defendant was described as a "bleacher" and the demise was of the premises "late in the occupation of Pullan." There was a clause that all buildings erected by the defendant for the purpose of bleaching should at the end of the term become Shaw's property. In 1859 the plaintiff purchased both mills. The defendant discharged the refuse through the drain into the stream in the same manner as Pullan. The plaintiff brought an action for pollution. It was held that the lease might be explained by the state of the premises at the time it was granted and the mode in which they had been previously enjoyed; and that, thus explained, there was an implied grant by Shaw to the defendant to use the stream for the purpose of his bleaching business, and therefore the plain-

(1) 4 Macq. 125.

(2) 1 H. & C. 676.

tiff who was in the position of Shaw could maintain no action against the defendant. Pollock C.B. said (1): "It has been argued that no apparent easement was granted by the lease, and that the previous mode of user of the premises cannot be inquired into; but I think that we are at liberty to ascertain the mode in which the premises had been enjoyed by the former lessee; their enjoyment as bleaching works being the object intended by the lessor in granting the lease. It is conceded that the former lessee used this stream for the purpose of carrying off his refuse, and I cannot see any difference between that case and taking water from a stream, and returning it in a foul condition. It is said that it is turning a watercourse into a drain, but in one sense all watercourses operate as drains. But, however that may be, the lessor, with full knowledge of the mode in which the premises had been used by the former lessee, grants to the defendant a new lease of the premises for the same purpose: and the plaintiff, who purchased the reversion, stands in the same position as the lessor, and cannot derogate from his own grant." Martin B. said (2): "I desire to rest my judgment on the decision of the House of Lords in *Ewart* v. *Cochrane* (3), that where there is a demise of premises with which certain rights have been usually enjoyed, it must be taken that the lessor has granted those rights. It is not necessary to consider what is appurtenant or what is not appurtenant,—there is the decision of the House of Lords to the effect which I have stated." Wilde B. said (4): "Each case must depend on its own circumstances and the intention of the parties, to be ascertained from the character, state, and use of the premises at the time of the grant, and in this case there is no doubt of the intention of the parties to be derived from the existing circumstances."

In the present case, if it is necessary to discuss the intention of the testator otherwise than by applying the usual canon of construction to his devise of Braxton, I should have thought, contrary to the view put forward by the defendants, that he probably intended the devisees of Braxton to enjoy the free water supply provided for Braxton in his lifetime, and did not intend to their detriment to devise Malta freed from the pipe easement, which only runs through a small corner of the grounds.

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(1) 1 H. & C. 683.
(2) 1 H. & C. 684.
(3) 4 Macq. 117.
(4) 1 H. & C. 686.

In *Watts* v. *Kelson* (1) it appeared that in 1860 the owner of properties A and B made a drain from a tank on property B to a lower tank on the same property, and laid pipes from the lower tank to cattle-sheds on property A for the purpose of supplying them with water, and they were so supplied till 1863, when the owner sold property A to the plaintiff, with all waters, watercourses, &c., to the same hereditaments and premises belonging or appertaining or with the same or any part thereof, held, used, enjoyed, or reputed as part thereof, or as appurtenant thereto. The plaintiff had the use of the water until the defendant, a subsequent purchaser of property B, stopped it. It was held that the watercourse was a continuous easement necessary for the use of property A, and would have passed by implication; that the plaintiff was entitled to the use of the water on the conveyance of that property without any words of grant; and that, supposing it only convenient and not necessary, the general words were sufficient to pass it. It was further held that the right was to have the accustomed flow of water through the pipes, without regard to the purpose for which the plaintiff used it; and that the right, therefore, was not lost by his erecting cottages instead of cattle-sheds. Mellish L.J., in delivering the judgment of the Court of Appeal, read the rule laid down by Erle C.J. in *Polden* v. *Bastard* (2) and said (3): "We are clearly of opinion that the easement in the present case was in its nature continuous. There was an actual construction on the servient tenement extending to the dominant tenement by which water was continuously brought through the servient tenement to the dominant tenement for the use of the occupier of the dominant tenement. According to the rule, as laid down by Chief Justice Erle, the right to such an easement as the one in question would pass by implication of law without any words of grant, and we think that this is the correct rule; but if words of grant are necessary, we also think that the general words in this case are amply sufficient to pass the easement." After referring to *Nicholas* v. *Chamber-*

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(1) L. R. 6 Ch. 166.

(2) L. R. 1 Q. B. 156, 161.

(3) L. R. 6 Ch. 173.

lain (1) he said (2): "This case has always been cited with approval, and is identical, not only in principle, but in its actual facts, with the case now before us. It was expressly approved of by Lord Westbury in *Suffield* v. *Brown* (3), where, though he objected to the decision in *Pyer* v. *Carter* (4), in which it was held that a right to an existent continuous apparent easement was impliedly reserved in a conveyance by the owner of two houses of the alleged servient houses, yet he seems to agree that a right to such an easement would pass by implied grant where the dominant tenement is conveyed first." Farther on he said (5): "It was further objected that the fact of the plaintiff having pulled down the cattle-sheds and erected cottages in their place, deprived him of the right to the use of [the] water. We are of opinion, however, that what passed to the plaintiff was a right to have the water flow in the accustomed manner through the defendant's premises to his premises, and that when it arrived at his premises he could do what he liked with it, and that he would not lose his right to the water by any alteration he might make in his premises."

In *Bayley* v. *Great Western Ry. Co.* (6), which related to a right of way and primarily raised a question of construction, a railway company purchased a piece of land on which was a stable. The premises were granted together with all "rights, members, or appurtenances to the hereditaments belonging or occupied or enjoyed as part, parcel or member thereof." The vendor had many years previously made a private road from the highway to the stable over his own land for his own convenience and had used it ever since. The soil of this road was not conveyed to the company and no express mention of it was made in the conveyance. It was held that notwithstanding the unity of possession at the date of the conveyance a right of way passed under the general words. The decision has little bearing on the present case, but Bowen L.J. said (7): 'The rule about rights of way which arise from implication is simply this, that on a severance of two properties, anything like a right of way, or any other easement which is used, and which is reasonably necessary for the reasonable and comfortable use of the part granted, is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual. When two properties are severed the parties to the severance, both the man who gives and the man who takes, intend that such reasonable incidents shall go with the thing granted as to enable the person who takes it to enjoy it in a proper and substantial way. This particular case is not a case of a way of necessity, though I do not say that there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary." Fry L.J. said (1): "It appears to me that the cases of *Watts* v. *Kelson* (2) and *Kay* v. *Oxley* (3) have laid down a general principle of construction which I think may be stated in this way, that if one person owns both Whiteacre and Blackacre, and if there be a made and visible road over Whiteacre, and that has been used for the purpose of Blackacre in such a way that if [the] two tenements belonged to several owners there would have been an easement in favour of Blackacre over Whiteacre, and the owner aliened Blackacre to a purchaser, retaining Whiteacre, then the grant of Blackacre either 'with all rights usually enjoyed with it' or 'with all rights appertaining to Blackacre,' or probably the mere grant of Blackacre itself without general words, carries a right of way over Whiteacre."

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(1) Cro. Jac. 121.

(2) L. R. 6 Ch. 174.

(3) (1864) 4 D. J. & S. 185; 12 W. R. 356.

(4) 1 H. & N. 916.

(5) L. R. 6 Ch. 175.

(6) 26 Ch. D. 434.

(7) 26 Ch. D. 452.

The subsequent criticism of Chitty J. in *In re Peck and London School Board* (4) upon the above summary of Fry L.J. must be confined to alleged implied grants of non-continuous easements, and it is unnecessary for me to attempt to discuss it for the purposes of the present case.

The general rule or canon of construction laid down in the authorities I have just referred to as to the rights acquired on severance when the quasi-dominant tenement is conveyed first applies to contemporary conveyances and devises by will of the quasi-dominant and servient tenements: see *Pearson* v. *Spencer* (1), *Allen* v. *Taylor* (2), and *Phillips* v. *Low.* (3)

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(1) 26 Ch. D. 456.

(2) L. R. 6 Ch. 166.

(3) L. R. 10 Q. B. 360.

(4) [1893] 2 Ch. 315, 321, 322.

The present case differs in its facts from those dealt with in such of the above authorities as relate to pipe or drain easements in that only a portion of the pipe line claimed by the plaintiff runs through the Malta property, the source of the water carried by the pipe being outside the alleged dominant and servient tenements. The plaintiff's answer to this is that he is not claiming a right to "water" as against the owner of Malta, but to a pipe and pipe easement devised as part of Braxton, which it would be a derogation from the testator's grant to interfere with, so long, at all events, as the water supply system, so devised, is in operation and not abandoned. This construction is in accordance with the dicta in *Arkwright* v. *Gell* (4) (see also *Powell* v. *Butler* (5)), and is, I think, within the scope and reasoning of the decisions in the cases that I have referred to. A somewhat analogous position to that contended for by the plaintiff in this case is exemplified in *Goodhart* v. *Hyett.* (6) In my judgment the plaintiff is right in the contention that he has put forward.

On behalf of the defendants an able and extensive argument has been addressed to me raising many alleged grounds of defence, some difficult and most of them interesting except perhaps to the parties litigant. I will deal with these arguments in the order in which they seem to arise:—

1. It is contended that under the word "appurtenances" in the devise of Braxton only then existing "legal" rights passed, and in support of this proposition *Bolton* v. *Bolton* (7), *Daniel* v. *Anderson* (8), *Whalley* v. *Tompson* (9), *Pheysey* v. *Vicary* (10), and *In re Peck and London School Board* (11) were cited. None of these cases deal with continuous easements and they do not, in my judgment, affect the construction and operation of the devise in the present case.

2. In the next place it is said that upon the severance of an

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(1) 3 B. & S. 761, 767.
(2) (1880) 16 Ch. D. 355.
(3) [1892] 1 Ch. 47.
(4) 5 M. & W. 203, 233.
(5) (1871) Ir. R. 5 C. L. 309.
(6) 25 Ch. D. 182, 186.
(7) 11 Ch. D. 968.
(8) 10 W. R. 366.
(9) 1 Bos. & P. 371.
(10) 16 M. & W. 484.
(11) [1893] 2 Ch. 315.

heritage a grant will only be implied (*a*) of such continuous and "apparent" easements as have in fact been used by the grantor during unity of possession, and (*b*) of those easements without which the enjoyment of the severed portion could not be had at all: see Gale on Easements, 8th ed. p. 111. This passage from Gale must, I think, be taken subject to the qualification by Mr. Willes, a former editor, referred to on p. 114 of the 8th edition, and subject also to the limited meaning of "apparent" easements which I will deal with presently. In the present case the right claimed, in so far as it involves a pipe easement, is continuous, and, within what I believe to be the true meaning of "apparent" in this connection, it is also an apparent one; it is also necessary to the reasonable enjoyment of the devise in all its parts within the meaning of the authorities. Subject to these observations I think this contention is well founded, but that it does not assist the defendants.

3. In the third place the defendants contend, and rightly, that an easement implied in such a grant as I am dealing with must and can only be one known to the law, and they submit that the easement claimed by the plaintiff falls short of this requirement in three respects—in that (*a*) it is precarious and not perpetual; (*b*) non-existent, because its enjoyment has been clam and not validly obtained as against the owner of the well; and (*c*) it is a claim to an easement in respect of percolating water.

As to (*a*), *Burrows* v. *Lang* (1) was relied on by way of example. In that case the plaintiff was a farmer whose land abutted on the defendant's pond. This pond and an artificial watercourse running through it had been constructed more than a century ago for the purposes of a mill on the defendant's property, on which the pond and watercourse wholly lay. The water was diverted from and returned to a natural stream, the supply being regulated by the defendant by a hatch at the intake sluice. During a previous common ownership of the mill and the farm the farm cattle, though chiefly watered at a watering place on the mill property, used also to drink direct from the pond at the common boundary. In 1886 the common owners conveyed the farm to the plaintiff without referring to any water rights, and in 1893 they conveyed

(1) [1901] 2 Ch. 502.

the mill to the defendant without any exception or reservation. The defendant having cut off the water at the sluice and fenced off the pond at the common boundary, the plaintiff brought an action for an injunction to restrain interference with his right of watering his cattle. It was held that, having regard to the special temporary purpose for which the watercourse was constructed, the expense of maintaining it, and the fact that it lay entirely on the mill property, the plaintiff had acquired no right either by implied grant or under the general words of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 6, to have it continued for his benefit, and, the watercourse being therefore precarious, he could have no right to the use of the water (if any) therein. Farwell J. said (1): "In the present case it appears to me that the fact that the water abuts on the plaintiff's land raises no presumption that it was intended to be for his benefit as well as for the benefit of the mill for which the watercourse was constructed. I hold, therefore, that no right has been shown to compel the continuance of this flow of water. . . . . Then the second point arises: it is said that even if the plaintiff has no right to have the flow continued, he nevertheless has the right to take water if and when it is in the pond. To my mind that is a claim which is inconsistent with the very idea of the nature of an easement. As stated by Lord Coke, Co. Litt. 113b, quoting Bracton 222b, the possession or seisina necessary for an easement must be nec per vim nec clam nec precario. What is precarious? That which depends, not on right, but on the will of another person. As Bracton 221a puts it: 'Si autem precaria fuerit et de gratia, quae tempestive revocari possit et intempestive, ex longo tempore non acquiritur jus.' That is to say, if the servient owner can tempestive aut intempestive—whether the dominant owner likes it or not—put a stop to the easement, there is really no easement, because the very idea of right which necessarily underlies an easement is negatived."

In that case the watercourse was entirely on the so-called servient tenement—made for its sole and temporary use—and determinable at any moment without any derogation of grant. In the present case the facts are all the other way, and the right

(1) [1901] 2 Ch. 510.

claimed against the defendants is not "precarious" in my view, for the reasons mentioned earlier in this judgment, and cannot be determined at the instance of the owner of the alleged servient tenement, as was the case in *Burrows* v. *Lang*. (1) With the question whether the water passing through the pipe is precarious, and if so, whether this assists the defendants, I will deal later.

With regard to (*b*), the suggestion is that the enjoyment of the easement through Malta has been "clam," on the ground that the pipe is not visible or apparent there, and that the present owner bought without notice. This is immaterial if the right claimed passed by the devise of Braxton, and, subject to what I have to say about the meaning of "apparent" easements, point (*b*) really depends entirely upon whether the defendants can set up an alleged jus tertii. They contend that, as against the owner of the well in the orchard, the plaintiff has made out no rights, on the grounds that one or more owners of the orchard, since the pipe was laid to the well there, have not known of it, that the well and the pipe were not visible and apparent there, that the enjoyment by Braxton has therefore been clam, and that consequently no title to the water has or can have accrued by prescription as against the owner of the well.

I do not think that in the circumstances of this case any such contention is open to the defendants, and I do not propose to decide, in the absence of such third person, to what extent the owners of Braxton have or have not acquired as against him such rights; the defendants have pleaded that no such rights have been acquired, but they have failed, in my judgment, in establishing this.

Prima facie and as against the defendants the plaintiff has proved, subject to the acts of the defendants complained of, substantially continuous and undisturbed user of the water from an artificial and apparently permanent reservoir or well on land outside the alleged dominant and servient tenements as of right for more than twenty years before action brought: see *Race* v. *Ward*. (2) And for all I know such rights may have existed by grant at the date of the devise in 1902, although no such grant has been put in and proved. The defendants' contention to the contrary under the point I am dealing with depends upon whether they have made out that as against the owners of the well the Braxton enjoyment of the water was clam and thus incapable of being acquired by time if not acquired by grant. As far as the evidence before me goes, and as against the defendants, I am satisfied that the pipe was openly laid in 1893 to the well, which was then open and unconcealed, and was subsequently apparent, in the only way that a pipe laid underground to a dug well can be apparent after it has been covered up, by being plainly visible as far as the intake pipe is concerned in the well itself, and this, though not known to Mr. Nugent, the present owner, or apparently to his immediate predecessor, was known, or must be deemed to have been known, to their earlier predecessor in title in 1893. This as against the defendants is sufficient to prevent the Braxton enjoyment from having been clam as alleged: see, inter alia, opinions of Lindley J. and Bowen J. in *Dalton* v. *Angus*. (1) The case of *Union Lighterage Co.* v. *London Graving Dock Co.* (2), which was cited by the defendants on this point, does not assist them. That was a case of alleged implied reservation on a grant of the quasi-servient tenement, and the tie-rods in question in that case were not only non-apparent on the property granted, but could not by reasonable diligence have been discovered there.

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(1) [1901] 2 Ch. 502.

(2) 4 E. & B. 702.

(*c*) With regard to the point that the plaintiff's claim is to percolating water and therefore one not known to the law the defendants relied on *Bradford Corporation* v. *Ferrand* (3) and the authorities therein referred to. That was a case of riparian rights. It was held that if underground water flows in a defined channel into a spring supplying a stream above ground, but the existence and course of that channel are not known and cannot be ascertained except by excavation, the lower riparian proprietors on the banks of the stream have no right of action for the abstraction of the underground water. Here again an alleged jus tertii is relied on. The facts in the present case are entirely different from those in *Bradford Corporation* v. *Ferrand* (3) and *Chasemore* v. *Richards* (4), in which cases no question of grant or prescription was involved. The question I have to decide is whether under

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(1) 6 App. Cas. 767, 789.

(2) [1902] 2 Ch. 557.

(3) [1902] 2 Ch. 655.

(4) 7 H. L. C. 349.

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the devise of Braxton and its appurtenances the pipe and pipe easement passed, and for reasons that I have already referred to I am of opinion that the defendants are not assisted by and are not entitled to rely upon this contention.

The defendants submitted that a pipe easement is an onerous burden upon a servient tenement, involving rights of repair and prevention of building, over the pipe line, and, being hidden and seldom ascertainable by the successive owners of the property through which it passes, is not " apparent," ought not to be lightly implied, and in general can only be obtained by express grant. This brings me to the question of the meaning of " apparent " in the expression " continuous and apparent easements." As a general rule most pipe easements, whether the pipes carry water or drainage, are invisible and non-apparent in the servient tenement through which they pass. It is not, I believe, an uncommon thing for a builder of two or more houses to pass the drainage of one or more into the outfall pipe of the house situate nearest to the main sewer. If after doing so he sells one or more of the houses so drained, retaining the one through which the drainage is passed, it would be an extraordinary result if he could afterwards derogate from his grant by severing the drain connection with the house retained, the outfall drain of which is utilized as above, on the ground that the connection being underground was not " apparent " on the retained servient tenement.

In *Dalton* v. *Angus* (1) Lord Blackburn said: " Those who framed the Code Napoléon had to make one law for all France. To facilitate their task they divided servitudes into classes, those that were continuous and those that were discontinuous, and those that were apparent and non-apparent (Code Civil, arts. 688, 689). Those divisions, and the definitions, were, as far as I can discover, perfectly new; for though the difference between the things must always have existed, I cannot find any trace of the distinction having been taken in the old French law, and it certainly is not to be found in any English law authority before Gale on Easements in 1839."

The expression " continuous and apparent easements " has, however, found its way into many English decisions. In *Pyer*

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(1) 6 App. Cas. 740, 821.

v. *Carter* (1), in which a drainage easement was held to be "impliedly reserved"—whether rightly or wrongly is immaterial here—the Court held as against the owner of the premises granted that "by 'apparent signs' must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject," i.e., seen or known on the premises granted. In *Union Lighterage Co.* v. *London Graving Dock Co.* (2) the question was similarly discussed with reference to the premises first conveyed—in that case also the alleged servient tenement.

In *Wheeldon* v. *Burrows* (3) Thesiger L.J. said: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." He was obviously not testing the matter by what could be seen on the retained servient tenement, but by what was necessary to the reasonable enjoyment of the premises conveyed and, I presume, ascertainable there.

If in a case like the present and in such cases as the drainage ones that I have referred to it is necessary in implying a grant of an easement for it to be "apparent" as well as continuous, the expression, in my judgment, means or includes easements "apparent" on the premises granted. The grantor, on the severance, ex hypothesi knows the facts, and the grantee takes such easements as are necessary to make the grant effectual and which on an examination of the granted premises can be seen or

(1) 1 H. & N. 916, 922. (2) [1902] 2 Ch. 557.
(3) 12 Ch. D. 31, 49.

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ascertained to exist. This test has been satisfied in the present case.

The result is that the plaintiff succeeds in the action, and I grant the injunction asked for, and give judgment for 40*s*. damages against the defendant Cotton. The defendants must pay the costs of the action.

Solicitors: *Beale & Co.; Cohen & Cohen; Richardson Sowerby, Holden & Co.*

G. R. A.

ASTBURY J. 1916 *March* 28, 29.

In re FIREPROOF DOORS, LIMITED.
UMNEY *v.* THE COMPANY.

[1915 F. 1237.]

Company—Directors—Minutes—Resolution omitted—Parol Evidence—Admissibility—Quorum of One—Committee of One—Series of Mortgage Debentures—Registration of Series—Sealing—Irregularity—Debentures valid as Agreements—Sufficiency of Registration as Series—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93, *sub-ss.* 2, 3.

The minutes of a meeting are not exclusive evidence of what takes place there. An unrecorded resolution may be proved aliunde.

Knight's Case (1867) L. R. 2 Ch. 321 applied.

Where a company is regulated by Table A (revised 1906) or New Table A a board of directors may appoint a quorum of one under art. 88 or delegate their powers to a committee of one under art. 91.

In the absence of special provision in the articles a mortgage debenture does not require a seal.

British India Steam Navigation Co. v. *Inland Revenue Commissioners* (1881) 7 Q. B. D. 165 and *Biggerstaff* v. *Rowatt's Wharf, Ld.* [1896] 2 Ch. 93 applied.

The registration of a series of debentures under s. 93, sub-s. 3, of the Companies (Consolidation) Act, 1908, protects not only debentures of that series properly issued, but also documents purporting to be debentures of that series which owing to some technical defect can only be upheld as agreements for those debentures, and it is not necessary to register those agreements separately under sub-s. 2.

WITNESS ACTION.

This was an ordinary debenture-holders' action, in which the defendant company, now in liquidation, raised certain points as to the validity of the plaintiff's debentures.

The company was incorporated on February 3, 1908, to make fireproof doors under a patent belonging to Schwarze, who lived in Germany. In the absence of special articles the company was governed by Table A (revised 1906), printed in Gore-Browne on Companies, 28th ed. p. 505, and in W. N. [1906] pt. ii. p. 233. The relevant articles are substantially the same as those in New Table A (Buckley on Companies, 9th ed. p. 563).

On February 17, 1908, the signatories resolved, pursuant to art. 68, that the board of directors should be two and that the first directors should be Herbert Umney (the plaintiff's husband) and Schwarze; that until otherwise altered by the board the quorum should be one; that Herbert Umney should be the chairman; and that for one year he should be managing director with the powers of a full board.

The company impeached this resolution on the ground that the quorum could only be fixed by the board under art. 88.

There were subsequently one or two board meetings at which Herbert Umney alone was present with the secretary, and certain business, including the allotment of shares, was transacted.

On April 30, 1908, the two directors held a board meeting at Quelle in Germany. Herbert Umney produced the minute-book and discussed the articles and the quorum of one appointed by the signatories and the general business of the company. Schwarze approved of what had been done, and agreed to the continuance of the quorum of one and that Herbert Umney should continue sole managing director in England. Certain formal resolutions as to increase of capital and purchase of further property were then passed, and these were alone recorded in the minutes. The unrecorded business was proved by the evidence of Herbert Umney, which was taken de bene esse subject to the company's objection that the minutes were the exclusive evidence of what took place at this meeting, and that there was therefore no evidence that the quorum of one was ever properly fixed under art. 88.

Herbert Umney then continued to act alone and to affix the company's seal when necessary in the presence of himself and the secretary. For instance, on December 16, 1908, he affixed the

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seal to a lease from the South Eastern Railway, and on December 29, 1908, he affixed it to agreements for the purchase of patents.

On December 21, 1911, a proposal to raise 4000*l.* by the issue of a series of forty first mortgage debentures of 100*l.* each ranking pari passu was laid before a general meeting. This meeting was adjourned from time to time. At the adjourned general meeting of February 19, 1912, it was resolved "that the directors having reported the needs of raising money the debentures put before the meeting be approved but that the matter be left to the board to raise more capital on such terms as to the board might seem fitting."

Each debenture charged the company's undertaking and goodwill and all its goods, chattels, effects, and property of every description both present and future, including its uncalled capital, in favour of the registered holder by way of a floating security, and every transfer had to be in writing and to be registered. The company had no real estate.

The plaintiff as a shareholder received a circular inviting subscriptions for the debentures. She had no separate banking account, but she had 500*l.* awaiting investment in her husband's bank; she therefore instructed her husband to apply the 500*l.* in obtaining five debentures for her, which he did. The company relied on these facts as affecting the plaintiff with constructive notice of all irregularities known to her husband in the transaction.

At a board meeting of March 30, 1912, Herbert Umney, as a committee, signed, sealed, and issued five debentures (1 to 5) to Ernest Umney and three (6 to 8) to the plaintiff. The plaintiff's three debentures were paid for by Herbert Umney's cheque on March 19, 1912.

At a board meeting of April 19, 1912, Herbert Umney signed, sealed, and issued two debentures (9 and 10) to the plaintiff and five (11 to 15) to Wright. The plaintiff's two debentures were paid for by Herbert Umney's cheque on April 23, 1912.

On May 2, 1912, Herbert Umney appointed Wright an additional director.

On August 26, 1912, Herbert Umney alone signed, sealed, and issued five more debentures (16 to 20) to Wright, and on October 1, 1912, two (22 and 23) to Ernest Umney, two (24 and 25) to Charles Umney, and two (26 and 27) to Field. No. 21 was never issued.

These twenty-six debentures, signed and sealed by Umney alone in the presence of himself and the secretary, were all paid for in cash, and the whole issue of forty debentures was registered as a series on April 19, 1912, under s. 93, sub-s. 3, of the Companies (Consolidation) Act, 1908.

The company impeached these twenty-six debentures, including the plaintiff's, on the ground that there was no valid board resolution for issuing or for sealing them, and in any case the seal was improperly affixed in contravention of art. 76, which requires the presence of two directors as well as the secretary.

At general meetings of July 10 and July 25, 1913, a special resolution was passed and confirmed that the number of directors should not be more than seven or less than two, and on July 25 Herbert Umney, Schwarze, Wright, Anderton, Pilditch, Dale (who subsequently withdrew his name), and Davies were appointed.

At a board meeting of December 22, 1913, Herbert Umney, Pilditch, and Anderton resolved that the debenture interest then overdue should be paid as soon as possible. On January 19, 1914, the board resolved that two should form a quorum.

On January 27, 1914, the point as to the affixing of the company's seal to the twenty-six debentures by one director only having been brought to the attention of a general meeting, it was resolved that this affixing of the seal be ratified and approved and that Herbert Umney be authorized to take the proper steps for procuring the signature of an additional director in every case. In pursuance of this resolution Schwarze's signature to the twenty-six debentures was obtained, though they were not resealed. On August 11, 1914, Schwarze was suspended owing to the war.

The remaining fourteen debentures were subsequently signed, sealed, and issued after proper resolutions by a proper quorum and the seal was affixed in the presence of two directors and the secretary. Eight were issued on April 13, 1915, and six on August 9, 1915.

On October 15, 1915, the company having made default in the payment of interest, the plaintiff on behalf of herself and all other the first mortgage debenture-holders issued a writ for the usual relief. On the same day she obtained the appointment of a receiver and manager, the company consenting to the order. On

ASTBURY J. November 1, 1915, the company passed an extraordinary resolution for voluntary winding up and appointed a liquidator.

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The company impeached (inter alia) the plaintiff's five debentures on the ground of insufficient quorum, improper sealing, and (if treated as agreements to grant debentures) insufficient registration, and contended that the plaintiff had notice of all irregularities through her husband, who had obtained the debentures as her agent.

Hon. Frank Russell, K.C., and *E. F. Spence*, for the plaintiff. The signatories had of course no power to fix the quorum, but the board meeting of April 30, 1908, either fixed a quorum of one under art. 88 or delegated their full powers to Herbert Umney as a committee of one under art. 91, and all acts done under this appointment were valid under art. 94. The minutes are not exclusive evidence of what took place at this meeting: *Knight's Case* (1); *In re Great Northern Salt and Chemical Works* (2); and Herbert Umney's evidence is therefore admissible. The quorum is also established by the practice of the board: *Lyster's Case* (3); and any irregularity was ratified by the company's resolution of January 27, 1914. In any case, any irregularity in the quorum or committee was a matter of internal management which did not concern the plaintiff—*County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (4)—as the mere fact that she employed her husband as banker to apply and pay for her debentures did not affect her with notice of what he knew aliunde: Conveyancing Act, 1882 (45 & 46 Vict. c. 39), s. 3.

The plaintiff, however, was affected with notice of art. 76, and therefore knew that the seal was improperly affixed. To this there are two answers. In the first place the seal was unnecessary. The articles did not require debentures to be sealed, and unsealed debentures are perfectly good as equitable charges: Palmer's Company Precedents, 11th ed., part 3, p. 129; *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (5); *Biggerstaff* v. *Rowatt's Wharf, Ld.* (6) Secondly, if the debentures did require sealing, they may be treated as agreements to issue debentures of the series: Buckley on Companies, 9th ed. p. 227; *In re Strand Music Hall Co.* (1); *Ross* v. *Army and Navy Hotel Co.* (2); *In re Queensland Land and Coal Co.* (3); *Pegge* v. *Neath and District Tramways Co.* (4); *Simultaneous Colour Printing Syndicate* v. *Foweraker* (5); just as a lease void at law under the Real Property Act, 1845 (8 & 9 Vict. c. 106), s. 3, may be used as an agreement: *Parker* v. *Taswell.* (6) The whole issue being registered as a series under s. 93, sub-s. 3, no further registration was required.

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(1) L. R. 2 Ch. 321.

(2) (1890) 44 Ch. D. 472, 483.

(3) (1867) L. R. 4 Eq. 233.

(4) [1895] 1 Ch. 629.

(5) 7 Q. B. D. 165.

(6) [1896] 2 Ch. 93.

Cunliffe, K.C., and *C. A. Bennett*, for the company. The quorum could only be fixed by a proper board resolution: *York Tramways Co.* v. *Willows.* (7) Now where there are minutes of a meeting those minutes are exclusive evidence of what took place: *In re Rotherham Alum and Chemical Co.* (8) Herbert Umney's evidence is therefore inadmissible to add to the minutes. Even if admitted, it only shows that the directors merely decided not to disturb what they imagined had been validly effected by the signatories. They did not realize that any act on their own account was requisite.

Again, a single shareholder cannot constitute a meeting: *Sharp* v. *Dawes* (9); and by parity of reasoning a single director cannot constitute a quorum. The plaintiff had notice of this irregularity through her husband, who was her agent in taking up the debentures: *Rolland* v. *Hart.* (10)

[ASTBURY J. The husband had knowledge aliunde. It did not come to him as her agent in taking up the debentures.]

The fact that the debentures were improperly sealed clearly put the plaintiff and her husband on inquiry.

Again, the sealing was obviously bad, and the ratification of January 27, 1914, was merely an ineffective ratification ad hoc. It did not purport to cure any other irregularities, and it did not cure the improper sealing. If the validity of the plaintiff's debentures depends on this alleged ratification, fresh registration was necessary. It is true that the articles do not require debentures to be sealed, but the board evidently determined to issue sealed debentures, and it is far from clear that in that case an improperly sealed debenture can be treated as an unsealed debenture properly issued.

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(1) (1865) 3 D. J. & S. 147, 158.

(2) (1886) 34 Ch. D. 43.

(3) [1894] 3 Ch. 181.

(4) [1898] 1 Ch. 183.

(5) [1901] 1 K. B. 771.

(6) (1858) 2 De G. & J. 559, 570.

(7) (1882) 8 Q. B. D. 685, 689, 695, 700.

(8) (1883) 25 Ch. D. 103, 109.

(9) (1876) 2 Q. B. D. 26.

(10) (1871) L. R. 6 Ch. 678, 681.

The plaintiff then says that her irregular debentures were at all events agreements for value to grant her debentures of the series. If so, particulars of those agreements, including the dates and the plaintiff's name, ought to have been delivered to the registrar under s. 93, sub-s. 2. Now particulars were only delivered for a series of debentures under sub-s. 3.

Hon. Frank Russell, K.C. You have given no evidence that those were the only particulars delivered.

Cunliffe, K.C. The file and certificate are here and show that particulars were delivered under sub-s. 3. That is enough to show that particulars under sub-s. 2 were not delivered. Now registration as a series protects all the debentures of that series : *In re Harrogate Estates, Ld.* (1); but it does not cover mere personal agreements to grant debentures. They do not form part of the series. So far, therefore, as the plaintiff is put to rely on her documents as agreements they are void under sub-s. 2.

Hon. Frank Russell, K.C., in reply. The ratification of January 27, 1914, was a recognition by the company that the debentures were valid securities apart from the sealing, which they attempted to put right. Though this was ineffectual, it was an effective ratification ab initio of all other irregularities, and no fresh registration was necessary on that ground.

If, however, the debentures required sealing, they can only be treated as agreements, and it is contended that particulars of those agreements ought to have been delivered under s. 93, sub-s. 2. There is no evidence that full particulars to satisfy both sub-s. 2 and sub-s. 3 were not delivered, but as it was a serial issue the registrar properly proceeded under sub-s. 3. The file does not prove non-delivery of particulars under sub-s. 2.

In any case the particulars under sub-s. 3 were sufficient. In the case of an individual mortgage, particulars, including the date

(1) [1903] 1 Ch. 498, 503.

of the mortgage and the name of the mortgagee, are required under sub-s. 2, and that also applies to an individual contract to mortgage. But where there is a series of debentures the Legislature is content with particulars under sub-s. 3 and treats the dates and names as immaterial. How can they possibly become material because owing to technical defects certain debentures of the series can only stand as contracts? They do not become individual contracts for individual mortgages under sub-s. 2, but contracts for debentures of the very series in which dates and names are not required. The registration under sub-s. 3 was clearly sufficient.

ASTBURY J., after stating the facts and holding that the mere employment of her husband to apply and pay for the debentures did not affect the plaintiff with notice of all he knew as director, continued: The company rightly contended that the quorum could only be fixed by the board and not by the signatories: *York Tramways Co.* v. *Willows* (1); but I think that what took place at the board meeting at Quelle was sufficient to fix the quorum of one. Schwarze concurred in the previous arrangements and agreed to their continuance. It was a recognition by both directors that in the future, as in the past, one director should act alone; and, apart from that, it amounted to a delegation of the board's powers to Herbert Umney as a committee of one in London under art. 91.

The company relied on *In re Rotherham Alum and Chemical Co.* (2) and contended that the minutes were exclusive evidence of what took place at the meeting. But that is putting it too high. An unrecorded resolution may be proved aliunde: *Knight's Case.* (3)

The company also contended that a quorum of one was impossible. But though it is true that one shareholder cannot constitute a meeting—*Sharp* v. *Dawes* (4)—it is not clear that one director cannot form a quorum of a board of two, and it is quite clear on the authorities that there may be a delegation to a committee of one under art. 91. (5)

If I am right so far, there was no irregularity in the quorum or committee which authorized the issue of the debentures or which authorized their sealing; and if I am wrong, it was a matter of internal management which did not concern the plaintiff: *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1)

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(1) 8 Q. B. D. 685, 689, 695, 700.

(2) 25 Ch. D. 103, 109.

(3) L. R. 2 Ch. 321.

(4) 2 Q. B. D. 26.

(5) *In re Taurine Co.* (1883) 25 Ch. D. 118.

The plaintiff's debentures were, however, improperly sealed under art. 76, and of this fact she had notice. But there is no provision in the articles requiring debentures to be sealed, and unsealed debentures are valid equitable charges: *British India Steam Navigation Co.* v. *Inland Revenue Commissioners* (2); *Biggerstaff* v. *Rowatt's Wharf, Ld.* (3) These debentures were recognized as valid securities by a quorum of three directors on December 22, 1913, and on January 22, 1914, the company in general meeting purported to ratify the imperfect sealing. This of course they could not do, but their conduct showed their knowledge that they had received the plaintiff's money in exchange for documents purporting to give her security, and they tried to put right the one irregularity they knew of. This amounted to a ratification of the plaintiff's documents as good securities. If I am right up to this point, the plaintiff is the holder of five debentures which are valid though unsealed.

Suppose, however, that the debentures in fact required sealing or were otherwise irregular. The plaintiff contends that in that case they amount to agreements, or sufficient evidence of agreements, to issue five debentures of the series to her, and that she has therefore five equitable debentures. In *In re Strand Music Hall Co.* (4) Turner L.J. said: "I apprehend, however, that where this Court is satisfied that it was intended to create a charge, and that the parties who intended to create it had the power to do so, it will give effect to the intention, notwithstanding any mistake which may have occurred in the attempt to effect it." The same principle was followed in *Ross* v. *Army and Navy Hotel Co.* (5) and other authorities. It is true that in these cases the holder possessed two documents, the agreement for the charge and the instrument of charge itself, and the latter alone was irregular. But the principle

(1) [1895] 1 Ch. 629.
(2) 7 Q. B. D. 165.
(3) [1896] 2 Ch. 93.
(4) 3 D. J. & S. 147, 158.
(5) 34 Ch. D. 43.

is equally applicable to a case where the agreement is implied by the irregular document of charge. A lease void at law under the Real Property Act, 1845, s. 3, may be used as an agreement: *Parker* v. *Taswell* (1); and I see no reason why an irregular debenture should not be treated in the same way.

The company then contended that if the plaintiff's five documents are not in fact debentures, and can only be upheld as agreements for debentures, they are not members of the series registered under s. 93, sub-s. 3, and are therefore not protected by that registration, but that particulars of these agreements, including the dates and the plaintiff's name, ought to have been delivered under sub-s. 2. There is no evidence that this was not done, but, assuming without deciding that the file and certificate showing delivery of particulars under sub-s. 3 may be treated as negative evidence as to non-delivery of particulars under sub-s. 2, it does not help the company. The plaintiff either holds five unsealed debentures which, assuming a seal is not required, are clearly part of the registered series, or she holds five several agreements by the company to give her five several debentures of that registered series, and in either case the particulars delivered under s. 93, sub-s. 3, were a sufficient compliance with the section.

Solicitors: *Edwin E. Clark; Langford & Redfern.*

(1) 2 De G. & J. 559, 570.

G. R. A.

ASTBURY J.
1916
March 8, 9;
April 17, 18,
19.

BRITISH UNION AND NATIONAL INSURANCE COMPANY v. RAWSON.

[1915 B. 921.]

Indemnity—Assignment to Principal Creditors—Amount recoverable.

The plaintiff company recovered judgment against a married woman in respect of a liability against which the defendant had indemnified her. Having no other separate estate, she assigned her right of indemnity to the plaintiff company, who gave written notice to the defendant:—

Held—(*a*) that the right of indemnity was separate estate and assignable to the plaintiff company as principal creditors; and (*b*) that the plaintiff company could recover the full amount of their judgment from the defendant.

In re Perkins [1898] 2 Ch. 182 applied.

Rendall v. *Morphew* [1914] W. N. 422; 112 L. T. 285, distinguished.

WITNESS ACTION.

In 1910 Jane Bond, the wife of Herbert Bond, was the registered holder of 840 shares of the plaintiff company. These shares were 1*l.* each with 5*s.* paid and an uncalled liability of 15*s.* a share.

In November, 1910, Jane Bond agreed to sell the shares to the defendant, a director and shareholder, and executed a transfer in his favour.

On December 13, 1910, the defendant, who wished the shares to be transferred direct to one Bill, wrote to Jane Bond returning the transfer, with the name of Bill substituted for his own name as transferee, and requesting her to approve and initial the alteration, and agreeing that upon her so doing he would indemnify her against all liability in respect of the shares.

On the faith of this letter, which was lost, the alteration was initialled by Jane Bond and the transfer was returned to the defendant. Bill was subsequently registered as owner of the shares. He was in fact an infant born January 4, 1894, and aged sixteen at the time of the transfer, though this was not known to Jane Bond.

On June 17, 1912, the plaintiff company went into voluntary liquidation, and on July 2, 1912, a supervision order was made. On the liquidator discovering that Bill was an infant, Jane Bond was placed on the list of contributories in respect of the 840 shares and became liable to pay 630*l.* for calls which were made for the full amount of the shares.

On July 6, 1914, the plaintiff company recovered judgment in the *Scott* v. *Morley* (1) form against Jane Bond as a married woman for the amount of the calls, interest and costs, but as she had no separate estate the judgment was fruitless.

By an assignment dated February 8, 1913, and made between Jane Bond of the one part and the plaintiff company of the other part, after reciting the above facts and reciting that the plaintiff company had agreed on having an assignment of the rights of Jane Bond against the defendant under the lost letter or otherwise to make no further claim upon Jane Bond in relation to the shares whether under the judgment or otherwise, it was witnessed that, in consideration of the plaintiff company's covenant thereinafter contained, Jane Bond assigned to the plaintiff company all that the benefit of the letter of December 13, 1910, from the defendant to Jane Bond and of the agreement by the defendant therein contained and all moneys that might then or thereafter become payable by the defendant pursuant to that letter and agreement and the benefit of all other rights of indemnity (if any) that Jane Bond might have against the defendant in relation to the said shares or judgment, to hold the same unto the plaintiff company absolutely. And the plaintiff company thereby covenanted with Jane Bond that the plaintiff company would not at any time thereafter take any step to enforce the said judgment or make any claim against Jane Bond, her heirs, executors, or administrators, in respect of the said judgment debt or in respect of the said shares or any of them except to the extent of the moneys recoverable from the defendant by virtue of the agreement of indemnity and other rights thereinbefore assigned to the plaintiff company.

On February 16, 1915, the plaintiff company gave the defendant written notice of this assignment, and on March 15, 1915, they commenced this action to recover the 630*l.*

In addition to numerous other points of defence (including a denial that any indemnity was given) the defendant raised the following legal points: First, that Jane Bond having no separate

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(1) (1887) 20 Q. B. D. 120.

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estate was never in a position to pay and had not in fact paid and by virtue of the plaintiff company's covenant in the assignment was not liable to pay anything to the plaintiff company in respect of the shares or under the judgment, and accordingly had not suffered and could not suffer any loss or damage in respect of which the defendant was or could be liable under the alleged contract of indemnity. Secondly, that the benefit of a contract of indemnity such as was alleged and sued on was not capable of being assigned whether at law or in equity, or (alternatively) that it could be so assigned and sued on only to and by an assignee who had discharged or become liable to discharge the liability in respect of which the indemnity was given.

The report is confined to these legal points.

Hon. Frank Russell, K.C., and *Stamp*, for the plaintiff company. Jane Bond's right of indemnity against the defendant was part of her separate estate bound by the judgment. It was clearly assignable to the plaintiff company, the principal creditors against whose claim the indemnity was given, so that they could sue the defendant direct instead of having him brought in as a third party: *In re Perkins.* (1) The plaintiff company are entitled to recover the full 630*l.* from the defendant even though Jane Bond has at present no other separate estate: *In re Perkins* (1); *Liverpool Mortgage Insurance Co.'s Case.* (2) This asset is carefully excluded from the release in the assignment to the plaintiff company.

Schwabe, K.C., and *Dighton Pollock*, for the defendant. Assuming that the indemnity was given to Jane Bond, she would have been entitled to recover what she had paid, and after payment that right would have been legally assignable. But she in fact paid nothing. She had therefore merely a bare right of indemnity. Her only right on that was in equity, where she could call on the defendant either to pay the plaintiff company or to set aside an indemnity fund: *In re Richardson* (3); *Cruse* v. *Paine* (4); *Evans* v. *Wood* (5); *Shepherd* v. *Gillespie.* (6)

Now that equitable right was not assignable. A bare right of

(1) [1898] 2 Ch. 182.
(2) [1914] 2 Ch. 617.
(3) [1911] 2 K. B. 705.
(4) (1869) L. R. 4 Ch. 441.
(5) (1867) L. R. 5 Eq. 9.
(6) (1867) L. R. 5 Eq. 293.

action is not assignable: *Fitzroy* v. *Cave* (1); and similarly a bare right of indemnity is not assignable: *Rendall* v. *Morphew* (2); at all events where the indemnifier is concerned to see that the money is properly applied in discharge of the liability indemnified: *In re Richardson* (3); *Liverpool Mortgage Insurance Co.'s Case.* (4) That is the case here, as the defendant is both a director and a shareholder, and if the calls became unnecessary he would be subrogated to Jane Bond's right to recover them.

Assuming, however, that the indemnity was assignable, the amount recoverable under the indemnity cannot exceed the amount properly recoverable under the judgment, which is limited by Jane Bond's present or future separate estate. It is not like a case in bankruptcy or liquidation where the judgment is a personal judgment for the whole amount, and the right of indemnity is clearly an asset independent of the amount of the estate. In the case of a married woman there is really no personal judgment. The judgment is only a proprietary judgment against the separate estate: *Scott* v. *Morley* (5); and the indemnity can only be used to protect and not to increase it. It is only an asset pro tanto. *In re Perkins* (6) and *Liverpool Mortgage Insurance Co.'s Case* (4) are distinguishable on this point.

There is the further point that the defendant is directly interested in the application of any money paid under the indemnity. In that case the amount recoverable under the indemnity cannot exceed the amount recoverable under the judgment: *In re Richardson* (3); *Liverpool Mortgage Insurance Co.'s Case.* (4)

Hon. Frank Russell, K.C., in reply. The judgment against a married woman is a personal judgment, though it can only be enforced against her separate estate (7), and the right of indemnity is clearly an asset assignable to the principal creditor, though probably not to an outsider in a case where the indemnifier is interested in the application of the money. If this were not so, an indemnity to a married woman without separate estate would be almost nugatory, and she could only enforce it piecemeal every time she acquired separate estate which was taken under the judgment. It is impossible that this is her only equitable remedy. In *Rendall* v. *Morphew* (1) the executors had fully administered the mortgagor's estate and were under no liability to the mortgagee under the covenant. Their right of indemnity against the assignee of the equity of redemption was therefore a bare indemnity against a non-existing liability, and they had nothing to assign.

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(1) [1905] 2 K. B. 364, 369, 371.

(2) [1914] W. N. 422; 112 L. T. 285, 287.

(3) [1911] 2 K. B. 705.

(4) [1914] 2 Ch. 617.

(5) 20 Q. B. D. 120.

(6) [1898] 2 Ch. 182.

(7) See *Holtby* v. *Hodgson* (1889) 24 Q. B. D. 103; *Pelton Brothers* v. *Harrison* [1892] 1 Q. B. 118.

Astbury J. (after dealing with other points of the case and holding that the indemnity was in fact given). The defendant contends that this indemnity was not assignable. The assignment was, however, to the principal creditors, and in my opinion the point is covered by *In re Perkins.* (2) In that case a lessee, Poyser, assigned the lease to Plaistowe, who assigned it to Perkins, each assignment containing a covenant by the assignee to pay the rent and keep his assignor indemnified against the covenants in the lease. Perkins died and Plaistowe became bankrupt, and the lessee, Poyser, who had been called upon to pay the rent and thus become the principal creditor pro tanto, bought from the bankrupt's trustee, and took an assignment of, the bankrupt's right to indemnity against Perkins's estate, withdrawing a proof he (the lessee) had carried in and releasing the estate of the bankrupt. It was held that the right of Plaistowe's trustee in bankruptcy to sue Perkins's executors upon his covenant to indemnify was "property" within the meaning of s. 168 of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), and assignable by the trustee; and that damages in an action by the trustee against the executors would not be confined to the dividend payable to the lessee in respect of his proof against Plaistowe's estate, but extended to the whole amount of the obligation under the covenants to pay and indemnify entered into by Perkins. It was also held, upon the construction of the deed of assignment and release, that the lessee had acquired the right of the trustee to sue Perkins's executors, and that the release did not extend to all the bankrupt's estate, but that the asset assigned to the lessee must be excluded from it. In the Court of Appeal, affirming North J., Lindley M.R. said (3): "The appeal

(1) [1914] W. N. 422; 112 L. T. 285, 287.

(2) [1898] 2 Ch. 182.

(3) [1898] 2 Ch. 188.

raises two questions, namely, (1.) whether the rights vested by the Bankruptcy Act in Plaistowe's trustee could be assigned by him to the plaintiff; and (2.) whether, having regard to the terms of the deed and the release of Plaistowe's estate, the plaintiff acquired any rights to sue Perkins's executor[s]." He held (*a*) that the plaintiff Poyser had a right of proof against Plaistowe's estate not only for the sums paid by the plaintiff for rent and fire insurance, but also in respect of Plaistowe's future liability under his own covenants with the plaintiff; (*b*) that it was competent for Plaistowe's trustee in bankruptcy to compromise the plaintiff's claim and to assign any assignable asset to the plaintiff in satisfaction of all demands against Plaistowe's remaining assets; (*c*) that the trustee's right to sue Perkins's executors upon Perkins's covenant of indemnity was an asset assignable to the plaintiff or to any one else; and (*d*) that the damages recoverable by the trustee in an action against Perkins's executors would not be confined to the dividend payable to the plaintiff in respect of his proof against Plaistowe's estate.

I will now deal with the point with regard to the release in the assignment to the plaintiff company. The defendant contends that this assignment is in such a form as to release Jane Bond from all liability, and that therefore the defendant is discharged from liability.

In *In re Perkins* (1) Lindley M.R. said (2): " If this release is to be construed as a release by the plaintiff of Plaistowe or of his estate from all liability under his covenants with the plaintiff, then the effect will be to discharge Perkins's estate from all liability under his covenant to indemnify Plaistowe. A liability to indemnify against a liability which has no existence, and which can never arise, is a contradiction in terms. . . . But in the view we take of the true construction of the deed of August 31, 1897, these questions do not arise."

In the present case there is a recital which, if it stood alone, would cause difficulty. There is a recital that the plaintiff company had agreed to make no further claim upon Jane Bond and a covenant that they would not do so either under the judgment or in consequence of it, except to the extent of the moneys recoverable under

(1) [1898] 2 Ch. 182. (2) [1898] 2 Ch. 189, 190.

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the indemnity, the document having obviously been carefully drawn to meet the observations in *In re Perkins*. (1) In that case Lindley M.R. said (2): "The release contained in the deed, although couched in very general terms, must, if possible, be so construed as not to defeat the object or purpose of the deed of which it forms part. The recitals and first witnessing part shew that the release cannot be rationally construed as extending to all Plaistowe's estate, including the asset assigned to the plaintiff. The estate released must exclude that asset. Again, the claims and demands from which Plaistowe's estate is released cannot be rationally construed as all claims and demands in respect of Plaistowe's covenants. The claims and demands released must be confined to those against the released assets, and cannot be rationally held to include those the preservation of which is essential to the recovery by the plaintiff of the asset assigned to him, and which asset he is to take in satisfaction of all demands." That case seems to me to cover the question as to the alleged release and assignment. It also covers the question whether an indemnity of this character, where a guarantor is interested in seeing that the moneys are properly applied in payment of the principal creditor, is assignable. It shows, at all events, that if the assignment is made to the principal creditor—in other words, if as a result of the assignment the money paid under the indemnity can only get into the right hands—then there is no objection to the assignment.

The defendant relied on *Rendall* v. *Morphew*. (3) In that case the executors of an insolvent mortgagor, Craig, assigned the mortgaged premises to Morphew, who covenanted to pay the mortgage debt and interest if and when demanded. Morphew paid the interest for some years and then refused to pay further. Rendall, the mortgagee, after applying to the executors for payment of principal and interest, took an assignment of the covenant from them and then alone sued Morphew for principal and interest. It was held that the covenant was a personal covenant and could not be assigned and that Rendall could not sue alone upon the covenant, and that the mortgagor's executors could not be added as co-plaintiffs at the trial. In that case no notice of the assignment

(1) [1898] 2 Ch. 182.

(2) [1898] 2 Ch. 190.

(3) [1914] W. N. 422; 112 L. T. 285, 287.

had been given to Morphew. Now the facts of that case are wholly and entirely different from those of the present. There the executors having sold the equity of redemption on the ordinary terms of indemnity had subsequently fully administered the estate, and in the meantime the purchaser of the equity had regularly kept down the mortgage interest. After complete administration the action was brought, eight or ten years afterwards, and the learned judge held that it must fail. He said: "A great deal of industry and ingenuity has been employed in defining the meaning of the covenant for indemnity. It is said on behalf of the plaintiff that it is no concern of the Court to consider that Thomas Craig was insolvent at the time of his death, that his estate has long ago been disposed of without devastavit, and that the executors could have successfully defended any action brought by the plaintiff. The claim is that the plaintiff, who at the time of Thomas Craig's death looked to an insolvent estate, is now, ten years afterwards, entitled to get his money back in full from the defendant under the covenant to pay. It would take a great deal to convince me of this. Whatever may be the rights of those who represent the estate of Thomas Craig under the covenant of indemnity those rights remain in the executors and are not capable of being assigned. It is on this part of the case that the defendant is entitled to succeed. The question is not to be tested in the manner which has been attempted. Here we have an assignment which we must test by assuming that it had been made not to a mortgagee or general creditor of Thomas Craig but to an outside speculator, which is a fair way. In that case how could he have framed his declaration? He could only have asked for a declaration that the defendant is bound to indemnify the estate of Thomas Craig and the executors. If the executors had committed a devastavit the claim of the mortgagee would not have been limited to the assets but would have been against the executors personally. Here, however, there was no devastavit and the assets have been fully administered. Therefore the declaration would be of no effect. This shows that the covenant was not capable of assignment." Now that case is clearly distinguishable. The assignment was made at a time when the mortgagor's estate had been fully administered, and when the executors to whom the indemnity had originally been given were under no liability to the plaintiff mortgagee. It was an attempt to revive a non-existing liability under the indemnity, and to that extent the learned judge held—and I have no doubt rightly held—that it could not succeed.

The defendant further relied upon certain expressions in *In re Richardson* (1) and in *Liverpool Mortgage Insurance Co.'s Case* (2) with the view of showing that an indemnity is assignable if the guarantor has no interest whatever in seeing that the money reaches any particular quarter, and that it is not assignable on the other hand if the guarantor is interested in seeing that the money is rightly applied to a particular purpose. I will assume that that is so as to an assignment to an outsider. But in *In re Perkins* (3) the guarantor was so interested, and an assignment to the principal creditor, which necessitated the money if recovered going to the right quarter, was held to be good. I have not been able to find anything to the contrary in *In re Richardson* (1) or in *Liverpool Mortgage Insurance Co.'s Case* (2), and on the other hand I think, if anything, they support the view that an assignment to the principal creditor is good on either hypothesis.

The defendant further contended that as Jane Bond was a married woman without separate estate, and as she was only liable in respect of her separate estate, and as the judgment against her was obtained, as it had to be, in the *Scott* v. *Morley* (4) form, the defendant's liability, if any, under this indemnity is limited to such a sum, if any, as could be recovered by the plaintiff company from Jane Bond out of her separate estate, which is nil. He relied on the fact that this assignment to the plaintiff company was made after their action against Jane Bond and after she had been examined as to her means, when it had been ascertained that as far as she was concerned, unless she got an accession of wealth from some independent quarter, no money could in fact be recovered from her by the plaintiff company. Now that seems to me to be unsound for several reasons. In the first place this claim under the indemnity was in itself part of her separate estate, and if she had sued the defendant, or if she had joined him as third party in the action brought against her by the plaintiff company, he would

(1) [1911] 2 K. B. 705.
(2) [1914] 2 Ch. 617.
(3) [1898] 2 Ch. 182.
(4) 20 Q. B. D. 120, 132.

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have had no defence. The moneys so recovered would have been her separate estate to answer the plaintiff company's claim, and that is none the less so because the action is postponed to a later period. Further, this lady may from time to time acquire separate estate in large or small amounts. Under the judgment against her she is responsible, if and when she so obtains any such accession of wealth, to answer the judgment pro tanto. I think she is entitled to have an indemnity as against that, but on the main case I think that this right under the indemnity was part of her separate estate and as such recoverable.

The result is there must be judgment for the plaintiff company for the amount of the calls, which the parties have agreed at 630*l.*

Solicitors: *Foss, Bilbrough, Plaskitt & Co.; Nordon & Drury.*

G. R. A.

SILCOCKS *v.* SILCOCKS.

[1915 S. 2235.]

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March 15, 16.

Will—Construction—Devise to A. and "his male heir for ever"—Words of Limitation or Purchase—Estate in Tail Male—Rule in Shelley's Case.

Testator, by a home-drawn will, made a series of separate devises of various parts of his real estate to A. "and his male heir for ever," the devises being in some instances preceded by life estates to other persons and in others made to him direct:—

Held, that the rule in *Shelley's Case* (1581) 1 Rep. 93b applied, and that A. took an estate in tail male either in possession or remainder according as the particular property was devised to him directly or subject to a life interest.

ADJOURNED SUMMONS.

Edward Silcocks the elder, late of the parish of Road, in the county of Somerset, by a home-drawn will dated January 9, 1897, after sundry specific legacies, devises, and bequests to various relatives, gave to his sister Mary Ann Kemp a life interest in a villa residence situated on Road Hill with coachhouse, and also gave her a life interest in a piece of pasture containing about six and a half acres, also a life interest in a cottage and garden, which at the death of the said Mary Ann Kemp was to become the property of "my residuary legatee and his male heir for ever." And the testator also gave and bequeathed to his niece Sarah Ida Jane Bush a life interest in a dwelling-house situated in High Street, Road, and adjoining the house therein last before mentioned, and at the death of the said Sarah Ida Jane Bush then to her eldest child, male or female, and in the event of no child then to "my residuary legatee and his male heir for ever." The testator further gave to his nephew Edward Silcocks, the plaintiff, a life interest in a field on Road Common, Road, containing about four acres, "and at his death to his male heir for ever," subject to the special conditions therein mentioned, namely, a charge of 4*l.* per annum to supply eight aged persons with 10*s.* worth of wearing apparel for ever. And the testator further gave the following list of property to the plaintiff Edward Silcocks the younger and "his male heir for ever," free from any special claim: the house and shops, timber yard, stores, and garden for so many years occupied by the testator himself, also an orchard and a piece of pasture land, "the said Edward Silcocks and his future heir to live in the said dwelling-house and to have the sole use of all furniture and everything inside the said dwelling, and nothing shall be disposed of by either the said Edward Silcocks or his future male heir." The testator also gave the field on Road Common called Little Green Close, containing about two acres, and all and everything else not mentioned in his will in the shape of property to the plaintiff Edward Silcocks the younger and "his male heir for ever who I [*sic*] by this will I make my residuary legatee."

The testator died on September 22, 1899, and his will was duly proved by the executors therein named on November 22, 1899.

Mary Ann Kemp was still living, and Sarah Ida Jane Bush was a spinster.

The plaintiff, Edward Silcocks, was married on November 18, 1895, and the defendant, Albert Edward Silcocks, who was born on February 6, 1901, was his eldest son.

This was an originating summons taken out under Order LIV.A by Edward Silcocks against his infant son Albert Edward Silcocks for the determination of the following questions:—(1.) Whether according to the true construction of the will the plaintiff was entitled to an estate in fee simple in remainder in—A. The hereditaments which at the death of the testator's sister Mary Ann Kemp were "to become the property of my residuary legatee and his male heir for ever." B. The hereditaments which in the event of the death without issue of Sarah Ida Jane Bush were devised to "my residuary legatee and his male heir for ever." (2.) Whether the plaintiff was entitled to an estate in fee simple in possession in—C. The hereditaments in which a life interest is given to the plaintiff and at his death "to his male heir for ever" subject to the conditions in the will mentioned. D. The dwelling-house and hereditaments devised to the plaintiff and his male heir for ever with a direction that the plaintiff and his future heir should live in the said dwelling-house. E. The field on Road Common and "everything else not mentioned in this my will in the shape of property" given to the plaintiff "and his male heir for ever." (3.) If the Court should be of opinion that the plaintiff was not entitled to a fee simple in all or any of the said hereditaments, whether the plaintiff was entitled to an estate tail or some other and what interest.

Arnold Jolly, for the plaintiff. The limitations to the plaintiff "and his male heir for ever," whether in remainder or possession, create an estate in tail male in the plaintiff: *Dubber* v. *Trollope* (1); *Richards* v. *Bergavenny*. (2) The fact that the limitation is to the male heir "for ever" makes no difference: *Fuller* v. *Chamier*. (3) The property limited to the plaintiff for life and at his death to his "male heir for ever" stands on the same footing under the rule in *Shelley's Case*. (4) *Archer's Case* (5) turned on words of limitation superadded to the word "heir" and is distinguishable. There is no gift here to the male heir as persona designata as in *Greaves* v. *Simpson* (6); and see *Evans* v. *Evans*. (7) Technical words of devise must be construed in their technical sense and be given their proper legal effect: *In re Simcoe*. (8)

There is no reason for distinguishing between "heir male" and

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(1) (1734) Amb. 453.
(2) (1695) 2 Vern. 324.
(3) (1866) L. R. 2 Eq. 682.
(4) 1 Rep. 93b.
(5) (1597) 1 Rep. 66b.
(6) (1864) 12 W. R. 773; 10 Jur. (N.S.) 609.
(7) [1892] 2 Ch. 173.
(8) [1913] 1 Ch. 552.

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"male heir" where those words follow on a gift to the ancestor: *Blackburn* v. *Stables.* (1)

[YOUNGER J. referred to *Doe* v. *Angell.* (2)]

That almost covers the present case. It is submitted, therefore, (1.) that "heir male" in the singular is equivalent to "heirs male" in the plural; (2.) that a devise to a person and his heirs male gives him an estate tail: *Tufnell* v. *Borrell* (3); *Baker* v. *Wall* (4); and (3.) that for the purposes of the rule in *Shelley's Case* (5) there is no distinction between the use of the words "heir male" and "male heir."

H. E. Wright, for the defendant. Apart from authority there would be little difficulty in arriving at what the testator intended.

[YOUNGER J. Does not the use of the words "for ever" after the words "male heir" suggest that the latter were used as a nomen collectivum?]

The words "for ever" were, it is submitted, intended to confer an estate in fee simple upon the male heir whom the testator regarded as the stock of a new descent. It is submitted that this case is practically *Archer's Case* (6), where the words were "to his right and next heir male."

[YOUNGER J. referred to *Lightfoot* v. *Maybery.* (7)]

That case is an authority that when technical terms are relied on the proper technical terms must be used and not a garbled form of them. Injury is often done to the intention of a testator by too strict an adherence to the meaning of technical terms. It is submitted, therefore, that the defendant, if at the death of the plaintiff he is his heir male, will take a fee simple in the devised property.

Arnold Jolly in reply. *Fuller* v. *Chamier* (8) shows that the addition of the words "for ever" to the limitation to the "male heir" makes no difference. The dicta of the House of Lords in *Lightfoot* v. *Maybery* (7) have no application to the present case. The rule in *Shelley's Case* (5) does not depend on the use of technical words: *Van Grutten* v. *Foxwell.* (9) In the present will the testator has used the special words "male heir for ever," and he must therefore have intended that they should bear a particular meaning, and it is submitted that the only way in which his general intention can be carried out is by creating an estate in tail male in the ancestor.

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(1) (1814) 2 Ves. & B. 367.
(2) (1846) 9 Q. B. 328.
(3) (1875) L. R. 20 Eq. 194.
(4) (1697) 1 Ld. Raym. 185.
(5) 1 Rep. 93b.
(6) 1 Rep. 66b.
(7) [1914] A. C. 782.
(8) L. R. 2 Eq. 682, 686.
(9) [1897] A. C. 658, 668.

Cur. adv. vult.

March 16. YOUNGER J. This is a highly technical question arising on the construction of a home-drawn will prepared for the testator by the village schoolmaster, who thought that he knew more law than he did. The testator was possessed of a considerable amount of real estate and was minded to dispose of that real estate among many individual members of his kindred by means of separate devises. He concludes his will by giving all and everything else not mentioned in the will in the shape of property to the plaintiff "and his male heir for ever who I [*sic*] by this will I make my residuary legatee."

There is one question involved in all the different devises, and it is whether the limitation following on the gift to the plaintiff himself of the property to his "male heir for ever" amounts to a devise in favour of the plaintiff of an estate in fee simple or in tail male, or whether the plaintiff under the will takes no more than an estate for life. Mr. Jolly, who has argued the case on behalf of the plaintiff with great ability, has rightly elected to claim that the estate so devised, if more than a life estate, is an estate in tail male; and it is on that point that the issue has been joined by Mr. Wright on behalf of the infant defendant.

I think that, as the result of the discussion, I may say with some confidence that there are one or two general principles applicable to the case which are no longer in question. The first is that where an estate of freehold is devised to an ancestor with a subsequent limitation to the "heir male" of that ancestor in the singular the ancestor will take an estate in tail male according to the rule in *Shelley's Case* (1), unless there is something express on the face of the will to show that the testator intended that the heir was to take as the root of a new descent. The foundation of this rule is to be found in *Archer's Case* (2), as explained in one of the notes to that case, which has been accepted by all subsequent authorities as correct.

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(1) 1 Rep. 93b.

(2) 1 Rep. 66b.

The next proposition established with reasonable clearness is that the words "heir male" in the singular may, in a will,—the rule is otherwise in the case of a deed—in order to give effect to the testator's intention be construed as a nomen collectivum, and for that proposition *Dubber* v. *Trollope* (1) and *Richards* v. *Bergavenny* (2) may be cited as authorities.

It is, however, true that where the word "heir" in the singular is used the devise is more easily taken out of the rule in *Shelley's Case* (3), and the Court will with greater readiness arrive at the construction that the "heir" was to be treated as the author of a new line of descent, and that the first taker took an estate for life only.

The question, therefore, in the present case is whether, where the expression is invariably "male heir for ever" you find enough to take the devises out of the rule in *Shelley's Case* (3) and bring them within the decision in *Archer's Case.* (4)

Now it has been held by Wood V.-C. in *Fuller* v. *Chamier* (5) that the words "for ever" are not sufficient to affect the construction although the words would be quite enough to create a fee, and he proceeds: "But it is necessary that there should be a clear and distinct limitation to the heir in the singular number, with a limitation over to his heirs in the plural number, in order to show that the singular 'heir' is made the stirps, and that the descent is to take place from him." And still later he says: "I find here nothing more than the superadded words 'for ever,' and I do not think that they are sufficient to show an intention in the testator to execute the estate in the heir as persona designata, so as to convert him into a purchaser. It is clearly, in my opinion, an estate executed in the ancestor, and these superadded words simply amount to an indication that the next heir male shall take in perpetual succession." Now if I had not had the assistance of that authority I should, until I heard the argument of Mr. Wright, myself have thought that the words "for ever" supported Mr. Jolly's argument, and I should not have suspected that they created for him any difficulty. Mr.

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(1) Amb. 453.

(2) 2 Vern. 324.

(3) 1 Rep. 93b.

(4) 1 Rep. 66b.

(5) L. R. 2 Eq. 682, 686, 687.

Wright's argument and Wood V.-C.'s judgment, however, show that I should have been wrong in this view; but Wood V.-C.'s observations also show that the words "for ever" are not sufficiently strong to carry Mr. Wright home.

I think, therefore, that *Archer's Case* (1), as explained by *Fuller* v. *Chamier* (2) and *Dubber* v. *Trollope* (3), establishes that the words used in this will are words of limitation only and confer on the first taker, according to the rule in *Shelley's Case* (4), an estate in tail male.

It remains only to consider whether the fact that the testator has used the words "male heir" and not "heir male" makes any difference in the result.

It is true that in *Lightfoot* v. *Maybery* (5) the view was expressed by Lord Atkinson and Lord Moulton, and less confidently by Lord Shaw, that, where there was no prior life estate given to the ancestor, the words "male heir" may have a signification different from that of "heir male" and would not necessarily mean "heir general as well as male." It is expressly stated by Lord Atkinson in that case that Lord Coke's rule of construction, with which the House of Lords was there dealing, was an artificial rule which the noble and learned Lords were unwilling to extend. But the application of the rule in *Shelley's Case* (4) does not depend on the use of technical words; the House of Lords were not in *Lightfoot* v. *Maybery* (5) dealing with that rule; and there is, I think, no sufficient ground for distinguishing between "heir male" and "male heir" where those words follow on a gift to the ancestor. This is shown clearly by *Doe* v. *Angell* (6) and *Blackburn* v. *Stables.* (7)

It appears to me, therefore, taking this will as a whole, that the testator by the language he has chosen to employ has in all these different instances conferred upon the plaintiff either in possession or remainder an estate in tail male in the particular properties devised to him. The summons must accordingly be answered in that sense.

Solicitors for all parties: *Milner & Bickford, for Ernest J. White, Trowbridge.*

(1) 1 Rep. 66b.
(2) L. R. 2 Eq. 682.
(3) Amb. 453.
(4) 1 Rep. 93b.
(5) [1914] A. C. 782.
(6) 9 Q. B. 328.
(7) 2 Ves. & B. 367.

W. I. C.

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April 13, 14,
18.

PUDDEPHATT *v.* LEITH (No. 2)

Applied. *In re* DEBTOR, No. 21 OF 1950 (No. 2) [1951] 1 Ch. 612

[1915 P. 2064.]

Practice—Costs—Set-off—Solicitor's Lien—Independent Actions in Chancery and King's Bench Divisions—Actions arising out of same Transaction—Jurisdiction of Chancery Division to allow Set-off—Rules of the Supreme Court, 1883, *Order* LXV., *r.* 14.

Prima facie the Court ought not, owing to the existence of a solicitor's lien, to refuse a set-off, if as between the parties to the action it would be fair and just to allow it, and if no fraud or imposition has been practised on the solicitor by collusion between them.

The plaintiff brought an action in the Chancery Division for an injunction to restrain the defendant from voting otherwise than in accordance with the plaintiff's direction in respect of certain shares which had been transferred to him by the plaintiff by way of mortgage to secure the repayment of a loan, and obtained an order with costs. The defendant had previously brought an action in the King's Bench Division for payment by the plaintiff of the arrears of interest then due on the loan and recovered judgment with costs. On an application by the defendant in the Chancery action that he might be at liberty to set off the costs ordered to be paid by him to the plaintiff against the sum ordered to be paid by the plaintiff to him in the King's Bench action:—

Held, that the Court had a discretion to allow a set-off.

Held, also, that, having regard to the fact that the plaintiff's claim in the Chancery action might have been raised by counterclaim in the King's Bench action, in which case a set-off would have been a matter of course, the Court ought to allow the set-off notwithstanding the plaintiff's solicitor's lien.

Reid v. *Cupper* [1915] 2 K. B. 147 followed.

Blakey v. *Latham* (1889) 41 Ch. D. 518 and *Bake* v. *French* [1907] 1 Ch. 428 not followed.

ADJOURNED SUMMONS.

This was a summons by the defendant asking that he might be at liberty to set off the sum of 75*l.* 11*s.*, being the taxed costs ordered by the judgment in the present action to be paid by him to the plaintiff, against the sum of 299*l.* 7*s.* 2*d.* ordered to be paid by the plaintiff to him by a judgment in the King's Bench Division dated December 2, 1915, in an action in which he was plaintiff and the present plaintiff was defendant.

The two actions arose out of the same transaction—a transaction

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of a loan of 2500*l.* by the defendant to the plaintiff, the payment of which, with interest at the rate of 5½ per cent. per annum, was secured to the defendant by an agreement under seal dated February 14, 1913, whereby the plaintiff transferred to the defendant by way of mortgage 2500 fully-paid shares of 1*l.* each in a company called the London and Cosmopolitan Mining Company, Limited. That mortgage was preceded by what Sargant J. at the hearing of the motion for an injunction referred to below held to be a collateral agreement which took the form of a letter addressed by the defendant to the plaintiff in which the defendant said that the plaintiff's voting rights in virtue of the shares held in mortgage by him during the period of the loan would be untouched though the shares would be in his name and his voice might give the vote; that he would give no such vote without consulting the plaintiff; and that he would vote in all cases where a vote was necessary in respect of those shares as the plaintiff wished him to do.

The plaintiff had paid no interest at all upon the loan, and on November 12, 1915, there was due to the defendant in respect of arrears of interest the sum of 289*l.* 18*s.* 2*d.* On that day the defendant issued a writ against the plaintiff in the King's Bench Division claiming that amount, and on a summons under Order XIV. judgment was on December 2, 1915, given for 290*l.* 17*s.* 2*d.*, with 8*l.* 10*s.* for costs. That judgment had not been satisfied in whole or in part, and another half-year's interest had since become due on the mortgage.

In the meantime, in November, 1915, a general meeting of the company was approaching, and the defendant threatening and intending to vote as he thought fit in respect of the shares and to disregard, as he had done once before, the plaintiff's expressed wishes on this subject, she on November 26, 1915, commenced this action in the Chancery Division claiming an injunction to restrain the defendant from voting upon a poll at any meeting of the company in respect of the 2500 shares otherwise than in accordance with her directions.

The plaintiff moved for an injunction accordingly. (1) The motion was heard by Sargant J. on December 17, 1915: it was treated as the trial of the action; and by an order of that date the learned judge granted the plaintiff an injunction in substance as claimed, and ordered the defendant to pay the plaintiff her costs of the action, but gave liberty to the defendant to apply to set off such costs when taxed against the amount recovered by him against the plaintiff under the judgment in the King's Bench Division above referred to. These costs had been taxed at the sum of 75*l.* 11*s.*, and in pursuance of the liberty so reserved to the defendant the present application was now made.

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(1) See *Puddephatt* v. *Leith* [1916] 1 Ch. 200.

H. E. Wright, for the summons. It is submitted that the Chancery Division has now, notwithstanding the decisions in *Blakey* v. *Latham* (1) and *Bake* v. *French* (2), complete discretion to allow a set-off whether in the same action or in different actions: *Reid* v. *Cupper* (3); *Meynall* v. *Morris.* (4) And this discretion extends to setting off a debt or damages against costs: *David* v. *Rees* (5); *Edwards* v. *Hope.* (6) If the Court has such a discretion this is eminently a case in which it ought to exercise it in the defendant's favour notwithstanding the solicitor's lien, inasmuch as the plaintiff's claim in the present action might have been raised in the King's Bench action, in which case a set-off would have been a matter of course.

Meyrick Beebee, for the plaintiff. The set-off in this case ought not to be allowed. The old practice of the Court of Chancery continues except where expressly altered by the Rules of the Supreme Court, 1883: *Pringle* v. *Gloag.* (7) The only alteration made in that practice by the Rules is by Order LXV., r. 14, which provides that "A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought." That rule does not, however, apply to a set-off of costs in independent proceedings: *David* v. *Rees.* (5) *Throckmorton* v. *Crowley* (8) is a direct authority that while damages in actions at law will be set off against damages in a suit in equity, the costs of a suit in

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(1) 41 Ch. D. 518.
(2) [1907] 1 Ch. 428.
(3) [1915] 2 K. B. 147.
(4) (1911) 104 L. T. 667.
(5) [1904] 2 K. B. 435.
(6) (1885) 14 Q. B. D. 922.
(7) (1879) 10 Ch. D. 676.
(8) (1866) L. R. 3 Eq. 196.

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equity will not be set off against a debt and costs recovered in an action at law. The old practice of the Court of Chancery was not to allow a set-off under different judgments whether costs against costs, damages against damages, or costs against damages: *Wright* v. *Mudie* (1); Daniell's Chancery Practice, 8th ed. vol. ii. p. 1051; Seton on Judgments and Orders, 7th ed. vol. i. p. 252, vol. ii. p. 1320; Cordery on Solicitors, 3rd ed. p. 376; *Hall* v. *Ody* (2); *Collett* v. *Preston* (3); *Blakey* v. *Latham* (4); *Bake* v. *French* (5); *Edwards* v. *Hope.* (6) The Court of Bankruptcy will not allow the costs of proceedings in the High Court to be set off against costs of proceedings in bankruptcy: *Ex parte Griffin.* (7) In *Hassell* v. *Stanley* (8) it was held that costs in the High Court could not be set off against costs obtained in the county court, although the proceedings were between the same parties.

Meynall v. *Morris* (9) is not in point. That was the case of an action and counter-claim and not of two actions in the Chancery Division; still less, as here, of one in the Chancery Division and one in the King's Bench Division. In *Reid* v. *Cupper* (10) Buckley L.J. was only dealing with the common law as distinct from the Chancery practice.

But assuming that the Court has a discretion in cases to which Order LXV., r. 14, does not apply, then the analogy of that rule shows that the discretion must be exercised judicially having regard to the circumstances of the particular case, and not upon any preconceived view that to allow the solicitor's lien to prevail must in every case be contrary to natural justice. Then what are the circumstances to which the Court must so have regard? It is submitted that they must be matters relating to the solicitor whose lien is sought to be affected, irrespective of his client, because as between the parties to the action themselves there can hardly ever be any possible ground for resisting a set-off. For example, the Court would, in the case put by Pickford L.J. in *Reid* v. *Cupper* (11) of a solicitor having unnecessarily multiplied

(1) (1823) 1 S. & S. 266.
(2) (1799) 2 Bos. & P. 28.
(3) (1852) 15 Beav. 458.
(4) 41 Ch. D. 523.
(5) [1907] 1 Ch. 428.
(6) 14 Q. B. D. 922, 925.
(7) (1880) 14 Ch. D. 37.
(8) [1896] 1 Ch. 607.
(9) 104 L. T. 667.
(10) [1915] 2 K. B. 147.
(11) [1915] 2 K. B. 155.

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the costs, allow the set-off notwithstanding his lien. On the other hand, when the Court is satisfied, in the words of Chitty J. in *Hassell* v. *Stanley* (1), that the solicitor "has fairly earned the money in respect of which the lien arises," it will not "take away from him that which he has justly earned."

The alleged insufficiency of the security in this case is not a matter which the Court should take into consideration, but if it does, the evidence points rather to its sufficiency.

H. E. Wright in reply. I rest my case on the discretion which the Court of Appeal in *Reid* v. *Cupper* (2) asserted in the broadest terms the Court possessed and on the anomaly which would exist if the practice were different in the two Divisions of the High Court. I also rely on the observations of Jessel M.R. and Brett L.J. in *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (3), to the effect that as regards matters not provided for by rules, where there is a variance in the old practice of the Chancery and Common Law Courts, that practice is to prevail which is considered by the Court most convenient.

Cur. adv. vult.

April 18. YOUNGER J. read the following judgment, in which, after stating the facts as above set out and referring to the order of December 17, 1915, directing the defendant to pay the plaintiff her costs of the action, but giving liberty to the defendant to apply to set off such costs when taxed against the amount recovered by him against the plaintiff under the judgment in the King's Bench action, he continued: It should, however, be stated, as both parties agree, that the learned judge when giving that liberty in no way expressed any opinion as to what the result of the application would be if and when it was made.

Now it will be observed that the plaintiff, if she had been so minded, might quite appropriately have raised the issue in this action by way of counter-claim in the King's Bench action. There can, I think, be no doubt that had she done so, and had the issues on either side in that way been determined in one proceeding as they have now been in two, the set-off asked for would have been a matter of course. It is, however, contended that the fact that the two questions have been disposed of in different actions and in different Divisions, and not in one action and in one Division, displaces any right to set-off which might otherwise have existed, and owing to the present state of the authorities, so far at least as the Chancery Division is concerned, the point, strange as it may seem, is one of extreme nicety, and it has been elaborately argued by Mr. Wright for the defendant and by Mr. Beebee for the plaintiff.

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(1) [1896] 1 Ch. 607, 610.

(2) [1915] 2 K. B. 147.

(3) (1879) 13 Ch. D. 310.

It is perhaps not too much to say that the difficulty is due to the decision of the Court of Appeal in *David* v. *Rees* (1), to the effect that the provisions of Order LXV., r. 14, with regard to set-off of costs between parties are confined to cases in which the judgments for costs sought to be set off against each other are in the same action or proceeding, and do not extend to cases in which the judgments for costs are in distinct and independent litigations.

The Court of Appeal in the recent case of *Reid* v. *Cupper* (2) has stated very clearly its grounds for questioning the correctness of that decision, but it has at the same time intimated that it is bound by it, and accordingly it can now only be reconsidered in the House of Lords.

The Court of Appeal, however, in the same case has definitely laid it down that notwithstanding the view that Order LXV., r. 14, does not allow a set off of costs in separate proceedings, still the decision in *Edwards* v. *Hope* (3) shows that the Common Law Courts at least had a discretion to allow the set-off by the practice previous to the Reg. Hil. Term, 1853, that that discretion was restored at least to the Common Law Divisions of the High Court of Justice on the repeal of those rules, and that in the case before it the discretion of the learned judge, Scrutton J., had been rightly exercised in favour of the set-off. I will in a later portion of this judgment give my reasons for saying that the judgment of the Court of Appeal went even further than I have so far indicated. Mr. Beebee, however, agreed that it went at least as far as that.

Further, it is made clear, both by the cases of *Edwards* v. *Hope* (3) and *David* v. *Rees* (1), that not only does the discretion, where

(1) [1904] 2 K. B. 435.
(2) [1915] 2 K. B. 147.
(3) 14 Q. B. D. 922.

it exists, extend to the setting off of costs against costs, but it extends also, in a proper case, to the setting off of debt or damages against costs, and that, indeed, was the particular set-off allowed in the last-named case.

Moreover, so far as the old Courts of common law were concerned, the allowance of a set-off was not confined to cases where both actions were in the same Court. In *Hall* v. *Ody* (1), a Common Pleas case notable for a characteristic outburst on the part of Lord Eldon referred to later, it was stated that a set-off had even been allowed by that Court between costs in a Court of Equity and costs in a Court of Law.

It seems to me quite clear, therefore, that if in this case the application to set off had been made in the King's Bench action by the defendant there, instead of, as it is in the Chancery action, by the defendant here, there would have been an ample discretion to allow it, if the Court thought it right so to do.

Is, then, the same discretion denied to the Chancery Division? The reason for saying that it is is based upon the practice of the old Court of Chancery in this matter prior to the Judicature Act as that practice has been interpreted since the Act chiefly by two decisions, one of Kay J. and the other of Parker J.

I need perhaps hardly say that the objection to allowing a set-off is not really usually entertained as an objection between party and party: it is as between the solicitor of the party against whom the set-off is asked and the party claiming it, for the set-off is, or may be, destructive of the solicitor's lien for costs. And the practice of the old Court of Chancery, and incidentally of other Courts, turning as it did on this very point, is conveniently summarized by Sir John Leach in *Wright* v. *Mudie*. (2) He says: "It is clear upon the authorities, that the practice of the Common Pleas, as stated in the case of *Hall* v. *Ody* (1), that the lien of the attorney for his costs is subject to the equitable claims of the parties as between themselves, is not adopted in the Court of King's Bench; and Lord Eldon, then Chief Justice of the Common Pleas, expressly states it to be contrary to the practice of the Court of Chancery. In *Taylor* v. *Popham* (3) Lord Eldon states the rule of this Court thus: That where in a cause costs may have been given in different proceedings on both sides, there the lien of the solicitor is only on the balance of costs which may be due to his client. That case is not an authority for setting off, against each other, the costs of different causes in this Court; and still less, for setting off costs here against costs in the King's Bench, when it is clear that that Court would not permit the set-off of costs there against the costs here." I pause there to point out that the ground upon which the rule as against the King's Bench was originally justified was that as there was no reciprocity on the part of the King's Bench, retaliation on the part of the Court of Chancery was permissible.

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(1) 2 Bos. & P. 28.

(2) 1 S. & S. 266, 267.

(3) (1808) 15 Ves. 72.

The general rule was again defended by Lord Eldon when sitting as Chief Justice of the Common Pleas in *Hall* v. *Ody*. (1) He says: "Finding it to be the practice of this Court that an attorney shall not take his costs out of the fund which by his diligence he has recovered for his client, where the opposite party is entitled to a set-off, it does not become me to say more than that I find it to be the settled practice with much surprise, since it stands in direct contradiction to the practice of every other Court as well as to the principles of justice. In the Court of Chancery the same parties are often concerned in many suits, and I never knew the idea entertained of arranging the funds till the respective attornies were paid their costs. However, as the attorney in this case has acted with a knowledge of the settled practice of the Court, he can have no right to claim the advantage of a more just principle; and it will only remain for the Court to consider, whether the practice of the Court of King's Bench should not be adopted here for the future."

Now it will be noticed that the practice in Chancery is not in either judgment treated as one resting on a discretion to be exercised in each case, but as a definite rule of procedure. It will, however, also be noticed that the practice is treated as being the same as in the King's Bench.

In that state of things Kay J. dealt with the question in *Blakey* v. *Latham*. (2) After reading Order LXV., r. 14, and dealing with the general principles of set-off he said: "If this case were

(1) 2 Bos. & P. 28, 29.

(2) 41 Ch. D. 518, 521.

absolutely free from authority I confess it seems to me difficult to see why the solicitor's lien should intercept the right. Take the simplest case one can imagine. A. brings an action against B., and it is dismissed with costs. B. brings another action against A., and that is dismissed with costs. The order in each case is, A. to pay B. his costs in the one action, and B. to pay A. his costs in the other action. Well, when those costs are taxed and the Master's allocatur is issued, there is a judgment in each action for a definite amount, and there is no doubt whatever that those judgments could be set off one against the other. That being so, just suppose the case (which is the only case in which the matter becomes the least material), that one of those parties, A., was insolvent and unable to pay anything; why B. should pay costs to A. for the sake of A.'s solicitor is what I cannot understand. I cannot see how there can be any equity for that. There is no connection whatever between A.'s solicitor and B. It is said A.'s solicitor by his diligence has obtained this order for costs against B. Very well; but suppose that is so: I turn to the language of Lord Chief Justice Cockburn in *Mercer* v. *Graves* (1), and he says this: 'The question is simply whether the defendant has or has not a right to set off his judgment against that of the plaintiff, the reason alleged in the replication that he cannot is, that the attorney for the plaintiff has a lien for his costs on the order or judgment obtained by the plaintiff, and the plaintiff is suing as trustee for his attorney. But the attorney has no such lien for costs as to be able to compel the plaintiff to bring the action on his behalf as trustee for him. In truth, as Mr. Brown pointed out, there is no such thing as a lien except upon something of which you have possession. The matter is thoroughly well explained in Chitty's Archbold's Practice (2), that although we talk of an attorney having a lien upon a judgment, it is in fact only a claim or right to ask for the intervention of the Court for his protection, when, having obtained judgment for his client, he finds there is a probability of the client depriving him of his costs.' Well, that is reasonable enough, and that is an equity against the solicitor's own client; but how can A.'s solicitor possibly have an equity against B. to make B. pay the costs which

(1) (1872) L. R. 7 Q. B. 499, 503.

(2) 12th ed. pp. 139, 140.

B. is ordered to pay to A., when B. cannot recover from A. the costs which A. is ordered to pay to B.—how can A.'s solicitor have an equity to make B. pay instead of setting them off? If this matter were free from authority, I should say that this is the most extraordinary equity I ever heard of." Then later on, but not referring to the way in which the old King's Bench practice had been interpreted in *Edwards* v. *Hope* (1), he said: "So that before this rule which gives the Court discretion"—i.e., Order LXV., r. 14—"there was a right acknowledged in the Court of Chancery that the solicitor who has a lien upon the costs recovered against the other side could by that lien intercept the costs ordered to be paid to the other party"; and accordingly he refused the set-off asked for, greatly as he deplored the result.

Again, in *Bake* v. *French* (2) Parker J., after deciding that Order LXV., r. 14, did not even allow a set-off of costs payable in a consolidated action against costs receivable under an order made prior to the consolidation in one of the actions which had been consolidated, proceeded as follows: "I must, therefore, deal with this motion on the footing that the consolidation does not affect the matter, and, inasmuch as the Rules of Court I have referred to have no application to independent proceedings, I must consider the question, what would have been the practice prior to the making of those rules? It seems to me that the practice of the Court independently of those rules was not to allow any set-off of costs in independent proceedings otherwise than subject to what is called in the reported cases, 'the solicitor's lien for costs.' This appears, I think, from the cases of *Wright* v. *Mudie* (3) and *In re Harrald*." (4) He, like Kay J., treated the matter as one of strict rule, and not of discretion at all.

The result, therefore, prior at least to *Reid* v. *Cupper* (5) and so far as authority goes, is that, while the practice in the King's Bench and in the old Court of Chancery was in this matter the same, still, curiously enough, the King's Bench Division had apparently a discretion in every proper case to ignore the solicitor's lien and allow the set-off, but the Chancery Division had none.

(1) 14 Q. B. D. 922.
(2) [1907] 1 Ch. 428, 436.
(3) 1 S. & S. 266.
(4) (1883) 52 L. J. (Ch.) 435; (1884) 53 L. J. (Ch.) 505.
(5) [1915] 2 K. B. 147.

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Further, the King's Bench Division exercised its discretion as it did by its approval of the principles enunciated by Kay J. in *Blakey* v. *Latham* (1), to which he in the Chancery Division felt himself powerless to give effect. And all this involved the extraordinary result that the Court of Appeal on an appeal from the King's Bench Division would or might allow a set-off, and on an appeal from the Chancery Division it would, under exactly similar circumstances, be compelled to refuse it.

Such a state of things, the result of Mr. Beebee's argument, if correct, would, I think, be intolerable. The question is whether I am compelled by the authority of *Blakey* v. *Latham* (1) and *Bake* v. *French* (2) to hold that it exists. I think that *Reid* v. *Cupper* (3) shows that I am not.

It appears, I think, from the judgments of all the Lords Justices, but specially from that of Pickford L.J., that this practice with regard to set-off was really discretionary in all Courts. Pickford L.J. says (4): "With regard to the second point, namely, that under those circumstances the case has to rest upon the old jurisdiction as to costs, I agree; but with regard to the second part of the proposition, that, according to the old jurisdiction of the Courts, this lien must be allowed, I do not agree. I think the result of the old practice was that the Courts had a discretionary power to allow this set-off, and a discretion as to the terms upon which they would allow it. The Court of King's Bench decided to exercise its discretion in one particular way, the Court of Common Pleas laid down a different and directly opposite rule. The Court of Chancery exercised its discretion in the same way as the Court of King's Bench, and the Court of Exchequer exercised its jurisdiction according to circumstances. The different Courts exercised their discretion in different ways. In *Edwards* v. *Hope* (5) the Court of Appeal expressly decided the point that the Courts, in exercising the old jurisdiction, exercised it with discretion as to the terms on which it was to be exercised. I thoroughly agree that we are bound by the decision in *David* v. *Rees*. (6) In this case the learned judge has exercised his discretion, and it has

(1) 41 Ch. D. 518.
(2) [1907] 1 Ch. 428.
(3) [1915] 2 K. B. 147.
(4) [1915] 2 K. B. 155.
(5) 14 Q. B. D. 922.
(6) [1904] 2 K. B. 435.

hardly been challenged that it was a perfectly proper exercise of his discretion." Now that judgment gets rid of all difficulty, and puts, if I may very respectfully say so, the whole matter upon a logical and consistent foundation. But Pickford L.J. goes on to give another ground which would lead to the same result. He says: "The reasons for thinking so could not be put better than in the admirable way in which they were put by Kay J. in *Blakey* v. *Latham* (1), that there might be a great injustice in a case where the client was not able to pay if the successful defendant in the first action were made to pay the plaintiff's solicitor's costs in the second action which the plaintiff ought to pay himself." That is to say Lord Eldon's views have now been displaced by those of Kay J. as to what is the best and most salutary rule of practice in this matter. That rule was always the rule of the old Court of Common Pleas, and accordingly the principle laid down by Sir George Jessel in *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (2) becomes applicable. In that case Brett L.J. said: "I am very glad to hear the Master of the Rolls affirm what I have myself often said since the Judicature Act came into operation, that in matters of practice not provided for by the new rules, that practice which upon consideration appears to be the best ought to prevail."

On every ground therefore, and notwithstanding the decisions in *Blakey* v. *Latham* (1) and *Bake* v. *French* (3), I think I have a discretion in this case, and the only question that remains for determination is how I ought to exercise it.

In my opinion I ought to exercise it in favour of the set-off notwithstanding the plaintiff's solicitor's lien. I have pointed out that the plaintiff's case in this action might have been raised by way of counter-claim in the King's Bench action. If it had, the set-off would have been a matter of course, for reasons similar to those stated by Eve J. in *Meynall* v. *Morris*. (4) I cannot think that the result should be affected by a mere accident of procedure.

Moreover, I am struck by the fact that both actions arise out of the same transaction, and, although I recognize that the plaintiff's own default in the performance of her obligations under the contract cannot have seemed to Sargant J. sufficiently serious to disentitle her to relief in Chancery, I may still, I think, have regard to the fact that the King's Bench Division judgment was obtained by the present defendant before the injunction was awarded against him, so that the reason for refusing the set-off in *Edwards* v. *Hope* (1) does not apply.

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(1) 41 Ch. D. 518.

(2) 13 Ch. D. 310, 312.

(3) [1907] 1 Ch. 428.

(4) 104 L. T. 667.

But, beyond all these considerations, I should wish to base this exercise of my discretion on broader grounds. Order LXV., r. 14, reversing as it did the rule which had prevailed in Courts of Common Law for nearly fifty years, and the recent judgment of the Court of Appeal to which I have referred go to show that the old views as to the sanctity of a solicitor's lien no longer obtain. As Rooke J. said in *Hall* v. *Ody* (2), " There can be no objection to reconsidering the practice, but it does not appear to me to be unfair as it stands at present. The attorney looks in the first instance to the personal security of his client, and if beyond that he can get any farther security into his hands, it is a mere casual advantage." That observation was repeated by Sir George Jessel in *Pringle* v. *Gloag*. (3) He says: " It appears to me that it would be a monstrous extension of the rights of a solicitor against the parties to an action to say that he should have the right to make the party who may have been successful in the ultimate result pay the losing party's costs; and unless I found an authority so deciding, I should decline to accede to any such proposition. If a solicitor says, Unless I have a lien I cannot get paid, the answer is, he should see before he undertakes a particular business for a client, that that client is able to pay him for it: a solicitor is not compelled to work for an insolvent client." In other words, the views of Kay J. and not those of Lord Eldon on this subject now hold the field, and it is well, I think, that they should. And the result, I think, is that prima facie a set-off should not owing to such a lien be refused if as between the parties themselves it would be fair and just to allow it and if no fraud or imposition has been practised upon the solicitor by collusion between them.

That in the present case the set-off would not be fair and just as between the parties was not even suggested by Mr. Beebee, and accordingly I think that the set-off ought to be allowed for the amount of 75*l.* 11*s.* less only the costs of this application, the defendant's costs of which will be taxed and deducted in the first instance from the 75*l.* 11*s.* referred to in the summons.

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(1) 14 Q. B. D. 922.

(2) 2 Bos. & P. 28, 29.

(3) 10 Ch. D. 676, 680.

Solicitors: *Field, Roscoe & Co., for Pinsent & Co., Birmingham; Hatchett-Jones, Bisgood, Marshall & Thomas.*

W. I. C.

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1916
May 3, 12.

1. *Re* WINDER'S WILL TRUSTS.
2 All E.R. 362.

In re MUIRHEAD.

MUIRHEAD *v.* HILL.

[1915 M. 2919.]

Apportionment—Dividends—Declaration after Death of Tenant for Life—Tenant for Life and Remainderman—Apportionment Act, 1870 (33 *&* 34 *Vict. c.* 35), *ss.* 2, 5.

A testator who died in December, 1913, bequeathed his residuary estate to trustees upon trust to pay the dividends and income thereof to his wife for life, and after her death to stand possessed of the residuary estate in trust for his nephews and nieces. The widow died on July 24, 1915. Part of the residuary estate consisted of stocks in three railway companies. In September, 1915, each of these railway companies declared a dividend, payable about a month afterwards, for the half-years ending on the preceding June 30, 1915:—

Held, that the Apportionment Act, 1870, applied, and the estate of the tenant for life was entitled to the whole of these dividends.

In re Oppenheimer [1907] 1 Ch. 399 followed.

Whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation.

ADJOURNED SUMMONS.

By his will, dated October 24, 1912, Henry James Muirhead appointed his wife, Gertrude Julia Muirhead, his brother the plaintiff Francis Lauder Muirhead, and another brother executors and trustees, and, after making certain specific devises and bequests,

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devised and bequeathed all his residuary estate to his trustees upon trust to sell and convert the same into money, and out of the proceeds to make the payments therein mentioned, and to stand possessed of the said residuary estate to invest the same and pay the dividends, interest, and income of the investments to his wife during her life, and after her death the testator directed his trustees to stand possessed of the residuary estate and the investments representing the same upon trust for his fifteen nephews and nieces as therein mentioned.

The testator died on December 18, 1913, and his will was proved by his widow and the plaintiff, the other executor having renounced probate. The testator's widow died on July 24, 1915, having by her will, dated May 24, 1911, appointed the testator and the defendant, Charles Edward Cecil Hill, executors thereof. The will was proved by C. E. C. Hill, the surviving executor.

The residuary estate of the testator included 4000*l.* consolidated ordinary stock of the Central Argentine Railway, Limited, 11,820*l.* ordinary stock of the Buenos Ayres Great Southern Railway Company, Limited, and 1100 4*l.* per cent. Extension shares, 1915, of 10*l.* each, of the Buenos Ayres Western Railway, Limited. On September 30, 1915, a final dividend for the year ending June 30, 1915, was declared by the Central Argentine Railway Company on their consolidated ordinary stock, and on November 2, 1915, the sum of 106*l.*, being the amount of the dividend payable in respect of the sum of 4000*l.* consolidated ordinary stock of the said company (less income tax), was paid to the plaintiff. On September 29, 1915, a dividend for the half-year ending June 30, 1915, was declared, by the Buenos Ayres Great Southern Railway Company on their ordinary stock, and on October 27, 1915, the sum of 208*l.* 16*s.* 5*d.*, being the amount of the dividend payable in respect of the sum of 11,820*l.* ordinary stock of the company (less income tax), was paid to the plaintiff. On September 30, 1915, interest for the half-year ending June 30, 1915, was declared payable by the Buenos Ayres Railway on the 4*l.* per cent. Extension shares, 1915, of 10*l.* each, of the said company, and on October 26, 1915, the sum of 194*l.* 6*s.* 8*d.*, being the amount of the said interest payable in respect of the 1100 4*l.* per cent. Extension shares of the company (less income tax), was paid to the plaintiff.

On December 21, 1915, the plaintiff, as the surviving executor and trustee of the testator's will, took out an originating summons asking inter alia that it might be determined whether the dividends declared and paid since the death of Gertrude Julia Muirhead in respect of the year ending June 30, 1915, on the railway stocks and the 4*l*. per cent. Extension shares above stated were payable to the defendant, Charles Edward Cecil Hill, as legal personal representative of Gertrude Julia Muirhead, or how otherwise the said dividends ought to be dealt with.

C. Stafford Crossman, for the plaintiff.

Maugham, K.C., and *J. M. Gover*, for the representative of the tenant for life. The question is whether the provisions of the Apportionment Act, 1870, cover this case: Carson's Real Property Statutes, 2nd ed. p. 754. Apart from that Act the authorities have decided that the fruit goes with the tree and that a tenant for life is only entitled to dividends declared during his lifetime: *Bates* v. *Mackinley* (1); *Wright* v. *Tuckett* (2); *In re Maxwell's Trusts* (3), which followed *Hartley* v. *Allen*. (4) These cases were under the old Apportionment Act, 1834 (4 & 5 Will. 4, c. 22), which has not been repealed but has been superseded by the wider provisions of the Act of 1870. The construction sought to be put upon the Act on behalf of the remainderman would deprive the tenant for life of dividends which wholly accrued during the time in which she was tenant for life. The preamble of the Act of 1870 shows that the object of the Act was to remedy mischiefs and inconveniences arising from rents and other periodical payments not being at common law apportionable in respect of time. We submit that ss. 2 and 5 of the Apportionment Act, 1870 (5), apply to and cover this case.

(1) (1862) 31 Beav. 280.

(2) (1860) 1 J. & H. 266.

(3) (1863) 1 H. & M. 610.

(4) (1858) 27 L. J. (Ch.) 621.

(5) The Apportionment Act, 1870 (33 & 34 Vict. c. 35), provided :—

Sect. 2: "From and after the passing of this Act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing, or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

Sect. 5: "In the construction of this Act . . . . The word

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It is admitted that the dividends would be apportionable for the period from June 30 to July 24, and it would be extraordinary and whimsical to hold that the earlier dividends which we claim as all belonging to the estate of the tenant for life do not pass because there was nothing to apportion, and the Act did not apply. There appears to be no authority directly in point, but in *In re Oppenheimer* (1) the point was in effect decided although it was not really argued. The case is referred to in Gover on Capital and Income, 2nd ed. p. 23. *Ellis* v. *Rowbotham* (2) is not really applicable, as the rent there was payable in advance according to a contract and had accrued before the event which brought about an apportionment, so that the Act was held not to apply.

Clayton, K.C., and *C. J. Farwell*, for those entitled in remainder. The result may be strange, but the Act must be construed according to its terms. Unless it applies, the estate of the tenant for life takes nothing. We submit that the Act does not apply when the event does not fall within the accruing period. Here there was nothing to apportion. The case of *Ellis* v. *Rowbotham* (2) is the converse case to this, but it governs it in principle.

Cur. adv. vult.

May 12. EVE J. delivered the following written judgment:—Down to the date of her death on July 24, 1915, the late Mrs. Gertrude Julia Muirhead was tenant for life of her husband's residuary estate. Part of the estate was invested in ordinary stock of the Central Argentine Railway and the Buenos Ayres Great Southern Railway and in Extension shares of the Buenos

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'dividends' includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies, divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word 'dividend' does not include payments in the nature of a return or re-imbursement of capital."

(1) [1907] 1 Ch. 399.

(2) [1900] 1 Q. B. 740.

Ayres Western Railway. In the month of September, 1915, each of these railway companies declared a dividend on the investment payable in the following month (or a few days afterwards) for the half-year ending on the preceding June 30. The question is whether these dividends, amounting in all to a sum of 509*l.* and upwards, belong to the personal representative of the late tenant for life, or to those who on her death became entitled to the income of the testator's estate.

It is conceded that the claim of the widow's representative must be established under the Apportionment Act, 1870, or otherwise fail. [His Lordship read ss. 2 and 5 of the Act.] It has been argued on behalf of the remainderman that the language I have read does not operate to make these dividends part of the estate of the late tenant for life because, if the claim of her estate is well founded, the entirety goes to her estate, and, there being no apportionment or division necessary, there is nothing to bring the Act into operation, or to which its provisions can apply. I do not think it is unreasonable to test this argument by one or two concrete cases. It is admitted here that in the events which have happened the Act applies to the dividends accruing on the investments for the half-year ending December 31, 1915, and that the widow's estate will take such proportion of these dividends as accrued between June 30 and July 24; but if the argument above stated be sound the result is this, that her estate takes a share of dividends earned over a period partly within and partly beyond her lifetime but has no part of the dividends earned in an antecedent period wholly within her lifetime. Or, again, had the widow died on June 29 it is conceded that the Act would have applied and her estate would have taken the whole dividend for the half-year ending June 30, less an apportioned part for the last day of the half-year, which would have gone to the remainderman; but had she died on June 30 her estate would have taken no share of the half-year's dividend because there would have been no part of it apportionable to the remainderman, and the Act would in these circumstances not have been applicable.

Unless I am compelled to do so I cannot attribute to the Legislature any results so fanciful, so whimsical, and so illogical, and I do not feel so compelled. In my opinion, whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation. The Act does not cease to apply because the accruing payments ultimately become due and payable by instalments some of which go entirely to one destination.

In the present case at the death of the tenant for life on July 24, 1915, there were dividends accrued and accruing de die in diem on these investments from December 31, 1914, and the Act made the whole of these dividends apportionable as on July 24, the estate of the tenant for life taking the proportion that had accrued down to that date, the remainderman taking the proportion accruing subsequent to that date. I am quite unable to see upon what principle that apportionment is to be disregarded and the Act to be treated as no longer applicable because the fund, which is the subject-matter of the apportionment, is afterwards made payable in instalments, the earliest of which go entirely to the estate of the tenant for life in part satisfaction of her apportioned part of the fnnd. I do not think the case of *Ellis* v. *Rowbotham* (1) has anything to do with the point I have to consider here. What that case decided was that the Apportionment Act has no application to payments which accrue before the happening of the event calling for the apportionment. None of the payments here accrued due until three months and more after the death of the late tenant for life.

The conclusion at which I have arrived that the whole of these dividends belong to the widow's estate is in accordance with the order made in *In re Oppenheimer* (2), though it does not appear from the report of that case that the point here raised on behalf of the remainderman was argued.

Solicitors for applicant: *Fowler & Co.*

Solicitors for respondents: *Cronin & Son; Capron & Co.*

(1) [1900] 1 Q. B. 740.

(2) [1907] 1 Ch. 399.

G. M.

Applied. Elliott
v. Pierson.
[1948] Ch. 452

PERRY *v.* SUFFIELDS, LIMITED.

[1915 P. 1244.]

C. A.
1916
May 4.

Vendor and Purchaser—Specific Performance—Contract contained in Letters—Offer and Acceptance—Subsequent Correspondence.

Though when a contract is alleged to be contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification, and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties at the date of the acceptance, the complete contract then arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at.

Statement of the law by North J. in *Bellamy* v. *Debenham* (1890) 45 Ch. D. 481 (1) and his criticism upon observations of Kay J. in *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1890) 44 Ch. D. 616 approved.

Hussey v. *Horne-Payne* (1879) 4 App. Cas. 311 distinguished.

Decision of Sargant J. affirmed.

Appeal from a decision of Sargant J.

The action was a vendor's action for specific performance of a contract contained in two letters of February 23 and March 3, 1915, for the sale and purchase of certain freehold licensed premises known as "Stannards'," otherwise the "Red Lion," in Rugby, at the price of 7000*l*. The plaintiff was the owner of two thirds of the property, a Mr. Brown being the owner of the other undivided third thereof. The plaintiff was in possession of the property and managing it through the agency of his son. For some time before the date of the contract the proposal of a sale had been discussed between the plaintiff and two of the directors of the defendant company with whom the plaintiff had business relations. Also before the contract certain negotiations were on foot for the acquisition by the Rugby Urban District Council of a portion of the property at the price of 1900*l*. This and the fact of Brown's co-ownership were disclosed by the plaintiff at an interview between himself and representatives of the defendant company on February 18, 1915. On February 23 the secretary of the company wrote to the plaintiff as follows: "Dear Sir,—Stannards', Rugby. At a meeting of directors held to-day I was instructed to write and offer you seven thousand pounds for freehold premises, goodwill and possession." It appeared from the minute-book of the company that the secretary was instructed to make an offer for the premises in writing of 7000*l.* On March 3, 1915, the plaintiff wrote to the secretary as follows: "Dear Sir,—Re Stannards'. I am obliged for your offer of seven thousand pounds for above in your letter of February 23rd last. Please note I now accept same, viz., 7000*l.* Yours faithfully, Geo. Perry." Between the dates of these two letters the plaintiff had endeavoured, unsuccessfully, to induce the defendants to increase the purchase price. A few days after writing his letter of acceptance the plaintiff put the matter into the hands of a firm of solicitors, who on March 18, 1915, wrote to the defendants' solicitor as follows: "We are instructed by Mr. George Perry that you are acting for Messrs. Suffield, Limited, on their proposed purchase from him and we accordingly send you for your approval a draft of the proposed contract for sale and purchase, together with a duplicate copy for your own use. We do not know whether it incorporates quite all the terms agreed, as Mr. Perry has not seen it and we have not had very full instructions from him." The draft contract contained stipulations as to commencement of title, the payment of a deposit, and the time for completion, which was to be postponed until after the completion of the other contract with the district council. After further correspondence, on April 10, 1915, the defendants' solicitor wrote to the plaintiff's solicitor returning the draft contract and saying "My clients will not entertain the purchase of the property on the conditions mentioned and therefore the negotiations must end."

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(1) The decision of North J. was affirmed by the C. A. for other reasons, [1891] 1 Ch. 412, without expressing any opinion on this point.

The plaintiff then commenced this action claiming specific performance of the contract contained in the two letters of February 23 and March 3, 1915.

The defendants by their defence contended that the letters did not and were not intended to settle more than one term of the proposed agreement of purchase, namely, the price to be paid for the freehold premises, possession, and goodwill; that the letters formed part only of a series of negotiations partly verbal and partly by correspondence for the purchase by the defendants of the licensed premises together with the trade fittings, furniture, and stock in trade, which were to be taken at a valuation.

Sargant J. held that there was nothing in the evidence and the circumstances under which the agreement in the two letters was come to to modify what was a plain contract. The two letters constituted a complete and definite contract between the parties, specific performance of which must be declared.

The defendants appealed.

Romer, K.C., and *Beebee*, for the appellants. In considering whether there is a concluded contract in this case the whole correspondence must be looked at: *Hussey* v. *Horne-Payne.* (1) If that be done it is clear that the parties were never agreed as to important details, namely, whether a deposit should be paid and, if so, how much; the date for completion; whether all the property should be sold to the defendants or part to them and part to the district council; and whether the fittings and stock in trade were to be included in the purchase. The later correspondence shows that there was no concluded contract. If at one stage of the negotiations there appears to be a concluded agreement it is not binding if the subsequent correspondence shows that other terms were in the contemplation of the parties: *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs.* (2) It is true that in *Bellamy* v. *Debenham* (3) North J. adversely criticized some of the observations of Kay J. in *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (2), but at the same time he said distinctly that it has always been open to a defendant against whom specific performance is sought to show that the written document signed by him did not include all the terms of the actual contract, and that he may do that either by reference to other correspondence which can fairly be read with the letters which are said to constitute the contract, or by means of parol evidence outside the written document altogether. It is submitted that there was here no completed contract.

(1) 4 App. Cas. 311.
(2) 44 Ch. D. 616.
(3) 45 Ch. D. 481.

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Martelli, K.C., and *J. M. Gover*, for the respondent, were not called upon.

Lord Cozens-Hardy M.R. This is an appeal from the decision of Sargant J., who has granted a decree for specific performance in the usual common form. But it is said that there was no concluded contract, because though there were two letters which in form are absolutely complete, yet the Court is entitled to go into subsequent matters between the parties and to say that they throw a light back on those letters and make them merely a part of negotiations which never ripened into a concluded contract. Now let us see what the letters are. "Stannards'" was a public-house which was owned by Perry in this sense, that he was actually owner of two thirds of the freehold, and he was in possession by his son of the entire property, carrying it on as a licensed public-house. The defendants are a limited company. On February 23, 1915, according to the minutes of the board, "It was resolved to make Mr. G. Perry an offer in writing of 7000*l.* for freehold premises, goodwill and possession for the licensed premises known as 'Stannards' Rugby." That resolution was given effect to by the following letter written by the secretary of the company, Mr. Alfred Wright, on that same date: "At a meeting of directors held to-day I was instructed to write and offer you seven thousand pounds for freehold premises, goodwill and possession." That letter was answered on March 3 by the plaintiff, who wrote to Mr. Wright: "I am obliged for your offer of seven thousand pounds for above in your letter of February 23rd last. Please note I now accept same, viz., 7000*l.*" That letter was brought before the board on March 8, and then the company decided in what way they would raise the purchase-money, namely, by loan from their bank. Now is it possible to doubt that those two letters amount to a concluded contract? *Hussey* v. *Horne-Payne* (1) seems to me to have nothing whatever to do with this case. In *Hussey* v. *Horne-Payne* (1), which was decided on demurrer, it appeared on the allegations in the statement of claim that there were prior to the date of the two letters, which were relied upon as satisfying the Statute of Frauds, certain terms which had been discussed and had not been settled between the parties.

(1) 4 App. Cas. 311.

In those circumstances the House of Lords held that it was a fallacy to say that the letters concluded the whole agreement, because it appeared from the allegations in the statement of claim itself that there were terms, namely, that the purchase-money should be paid by instalments, the amount of such instalments, and the periods at which they should be payable, which had not been settled between the parties at that date. We are not troubled with that here. It is said, however, that the agreement is silent as to the date for completion. It is the first time I have heard that a contract is not complete, so as to satisfy the Statute of Frauds, unless the date fixed for completion is prescribed. It is part of the common law applicable to cases of this kind that the fixing of the date for completion is a matter which arises after the title has been accepted, or rather after the inquiry as to title. Then it is said there is no stipulation as to the payment of a deposit. Again I say I have never heard that there may not be a perfectly good contract satisfying the provisions of the Statute of Frauds although there is no provision for payment by instalments. Then it is said that the plaintiff would have liked to have a deposit. I daresay he would, but that is quite a different matter. Mere arrangements which in the ordinary course of business are left to the legal advisers to settle, such as the date for completion, are subsequent matters which do not prevent the two letters constituting a concluded agreement.

Counsel for the appellant has referred to what Kay J. said in *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1), and also to what North J. said in *Bellamy* v. *Debenham* (2); and as the point does not seem ever to have come before the Court of Appeal, I think it right to say, for myself, that I agree with the criticism of North J. in *Bellamy* v. *Debenham* (2) upon the observations of Kay J. in *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1), and I absolutely accept his decision in *Bellamy* v. *Debenham* (2), the effect of which is, I think, accurately stated in the head-note: "Though, when a contract is contained in letters, the whole correspondence should be looked at, yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained

(1) 44 Ch. D. 616. (2) 45 Ch. D. 481.

all the terms agreed on between the parties,"—that means, of course, agreed on at the date of the offer and acceptance—" the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shewn that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at." Now Sargant J. refers to a passage in Fry on Specific Performance, par. 551 : " The effect of subsequent letters may perhaps be thus stated. If the subsequent correspondence leads to the conclusion that at the date of the letters relied on as the memoranda of the contract there was no contract in fact, then the plaintiff must fail : if, on the other hand, the whole evidence shows that at that date there was a consensus between the parties upon the terms expressed in the letters relied upon, then the subsequent correspondence, unless amounting to a new contract or an agreement for rescission can have no effect upon the existence of the contract." Then, after referring to *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (1) and saying that Kay J.'s proposition seems worthy of further discussion, the learned author proceeds to deal with *Bellamy* v. *Debenham* (2) in par. 553. He says : " In *Bellamy* v. *Debenham* (2) North J. discussed the language used by Kay J. in *Bristol, &c., Bread Co.* v. *Maggs* (1), and said : ' In my opinion, subsequent negotiations, first commenced on new points after a complete contract in itself has been signed, cannot be regarded as constituting part of the negotiations going on at the time when it was signed.' This seems to be good law. It would seem clear that if the letters of proposal and acceptance in fact contain all the terms agreed on at the time, and were written with the intent of binding the writers, this complete contract could not be affected by subsequent negotiations not resulting in a new contract." That is really the view taken by Sargant J. It seems to me perfectly in accordance with good law, and there is nothing in the present case to induce me to think that there ought to be any variation of the rights of the parties as expressed in those two letters of formal offer and acceptance.

We are, however, asked to say that the draft contract sent by the plaintiff's solicitor was in some way a reopening of the arrange-

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(1) 44 Ch. D. 616.

(2) 45 Ch. D. 481.

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ment between the parties. I decline to accept that view. The solicitor frankly said he was not sure that he was fully instructed, and his attempt to alter the contract contained in those letters by making a new contract containing different terms as to price, as to fixing a date for completion, and as to the postponement of completion until after the completion of another contract for the purchase of a portion of the property by the Rugby Urban District Council seems to me to be entirely outside the question. The parties' rights were for all purposes sufficiently settled by the two letters of offer and acceptance. In my opinion the appeal fails and must be dismissed with costs.

PICKFORD L.J. I am of the same opinion. I quite agree with the judgment of Sargant J. I will only add that I also agree entirely with what the Master of the Rolls has said as to the comments of North J. in *Bellamy* v. *Debenham* (1), and also those in Fry on Specific Performance upon the observations of Kay J. in *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs.* (2)

NEVILLE J. I agree. I think the judgment of Sargant J. was right, and I also think that the case of *Bristol, Cardiff, and Swansea Aerated Bread Co.* v. *Maggs* (2) goes too far, and that the law is correctly laid down by North J. in *Bellamy* v. *Debenham.* (1)

Solicitors for appellants: *Billing & Co., for Arthur A. Rollason, Birmingham.*

Solicitors for respondent: *Routh, Stacey & Castle, for George M. Seabroke & Son, Rugby.*

(1) 45 Ch. D. 481. (2) 44 Ch. D. 616.

G. A. S.

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1916

May 15; *June* 1.

In re FRIED KRUPP AKTIEN-GESELLSCHAFT.

[1915 J. 94.]

Trading with the Enemy –Payment of Debts due from Enemy—Interest—Trading with the Enemy Amendment Act, 1914 (5 *Geo.* 5, *c.* 12), *s.* 5—*Trading with the Enemy (Vesting and Application of Property) Rules*, 1915, *r.* 4—*Rules of the Supreme Court*, 1883, *Order* LV., *r.* 63.

Where the Court has made an order, to which the custodian was a consenting party, under s. 5, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, directing the custodian out of money in his hands to make a distribution in respect of debts due by the enemy, the creditors on establishing their debts in chambers are not entitled to interest at 4 per cent. per annum under Order LV., r. 63, of the Rules of the Supreme Court, 1883, on debts which do not carry interest. Rule 4, sub-r. 4, of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915, made under s. 5, sub-s. 5, of the Act, does not incorporate Order LV., r. 63, for this purpose, or if it does, the rule so far is ultra vires.

While by s. 5, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, as amended by s. 12 of the Trading with the Enemy Amendment Act, 1916, the custodian is not empowered to pay out of the property paid to him in respect of an enemy the whole or any part of any debt due by that enemy unless so authorized by an order of the High Court or a judge thereof, the Court cannot require the custodian to make any such payment against his will. The decision whether payment shall or shall not be made rests ultimately with the custodian, subject only to the proviso that before paying any debt he must satisfy himself that he retains property paid to or vested in him in respect of the enemy in question sufficient to satisfy that debt and any other claims against that enemy of which notice verified by statutory declaration may have been served upon him.

Whatever be the ultimate destination of the funds in the hands of the custodian under the Order in Council hereafter to be made under s. 5, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, it is plainly desirable that no payment out of enemy money should be authorized by the Court which could not by law be justified as against the enemy himself. The fund should be kept intact for restoration, if need be, at the end of the war, less only such payments out of it for administration or otherwise as the enemy could not himself validly or reasonably object to if he were here to oppose them.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment:—"In this case of the Fried Krupp Aktien-

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Gesellschaft, the well-known Essen company, a vesting order under the Trading with the Enemy Amendment Act, 1914, was made on June 12, 1915, at the instance of Messrs. J. Wild & Co., of Middlesbrough, who claimed to be creditors of Messrs. Krupp in the sum of 25,600*l.* By that order an inquiry was directed to be made of what debts, if any, were owing by the enemy company to persons within the United Kingdom not being enemies within the meaning of the above Act. By a further order of November 26, 1915, on the narrative that the custodian had then in his hands a sum of 53,828*l.* 17*s.* in cash in addition to stocks, shares, and other securities and property vested in him by the order of June 12, 1915, and that the total amount of debts claimed and unsatisfied by the enemy company of which notice was then had did not exceed the sum of 41,700*l.* and that the enemy company admitted that the sums thereby directed to be paid to the several creditors mentioned in the schedule were due to them respectively, it was ordered, the custodian being a party to the order, that he should out of the cash in his hands pay to these creditors the amounts set opposite their respective names in the schedule to the order. That order was one of interim distribution made for the convenience of creditors, the enemy company consenting; and I may say in passing that in this case the enemy company have appeared in the proceedings, and communications with reference to pending matters have by permission been addressed to their head offices at Essen, and it is only fair to Messrs. Krupp to say that they have given every possible assistance to the Court in answering the inquiry which it directed.

"The Master is proceeding to complete his certificate, and while so engaged an application was made to him that upon the debts of the creditors established before him, irrespective of any question whether by law these debts carried interest or not, he should allow interest at the rate of 4 per cent. per annum pursuant to Order LV. r. 63, of the Rules of the Supreme Court, 1883, and that upon the debt of Messrs. Wild & Co., which it is alleged does by agreement carry interest at the rate of 5 per cent. per annum, he should allow interest at that rate, the object of the application being that not only the debts of the enemy company found in answer to the inquiry, but all such interest, should ultimately be paid out of the moneys vested in the custodian in respect of the enemy company.

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It was obvious that this application raised a very important question of principle affecting not only this but many other cases under the Act, and accordingly by arrangement a summons was taken out by the enemy company and adjourned into Court for argument asking for directions whether or not the creditors other than Messrs. Wild & Co. claiming under the inquiry directed by the order of June 12, 1915, are entitled to claim interest at the rate of 4 per cent. per annum on the amount allowed as due to them as creditors, and whether interest at the rate of 5 per cent. per annum from the contract dates of payment should be allowed on the claim of Messrs. Wild & Co."

Dighton Pollock, for the summons. Apart from contract the creditors are not entitled to interest. The debts in question do not carry interest by law. [He referred to Leake on Contracts, 6th ed. pp. 804, 805; Civil Procedure Act, 1833, s. 28.] The vesting order under the Trading with the Enemy Amendment Act, 1914, s. 4, is not equivalent to a judgment or order under the Rules of the Supreme Court, 1883, Order LV., r. 63, and the provision made in r. 63 for the allowance of interest at the rate of 4 per cent. per annum on debts which do not carry interest as from the date of the judgment or order in administration proceedings is not incorporated into proceedings under the Trading with the Enemy Acts by r. 4, sub-r. 4, of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915. Rule 4, sub-r. 4, which provides that in directing any payment under s. 5, sub-s. 2, of the Act the Court shall act in accordance with the rules and practice of the Chancery Division in the administration of estates, cannot create a right which did not previously exist. There is no provision in s. 5, sub-s. 2, of the Act for payment of interest, and the benefit conferred on creditors of the enemy company under that section is an indirect advantage to the creditors and not the main object of the Act.

Mathew, K.C., and *H. E. Wright*, for creditors whose debts did not carry interest. Interest at the rate of 4 per cent. per annum should be allowed on these debts. The Act was intended to do justice to all parties. If the creditor had obtained judgment his debt would have carried interest from the date of the judgment, The creditor is practically prevented from pursuing this course by the war, and the Act is intended to remedy that state of things. The only qualification on the allowance of interest is that contained in the proviso to s. 5, sub-s. 2, of the Act. There is a large surplus here and that proviso has no application. Subject to that proviso, r. 4, sub-r. 4, directing the Court to act in accordance with the ordinary rules and practice of the Chancery Division in the administration of estates, has the effect of incorporating the provisions of Order LV., r. 63, of the Rules of the Supreme Court, 1883, and entitles the creditor to 4 per cent. interest on his debt, the vesting order under s. 4 of the Act taking the place of an administration order in the Chancery Division. There is no longer any discretion in the custodian to refuse to pay interest, he having been ordered to pay the debts by the order of November 26, 1915, after which r. 4, sub-r. 4, operates automatically. If necessary we should be content to calculate interest on the debt as from the date of the order of November 26, 1915.

Clauson, K.C., and *Percy Wheeler*, for J. Wild & Co., supported the same argument, and further contended that as the debt to J. Wild & Co. carried interest by contract the interest at the rate contracted for formed part of the debt.

Austen-Cartmell, for the custodian. The only authority conferred by s. 5, sub-s. 2, of the Act is to pay "debts" due by the enemy, and, if the direction in r. 4, sub-r. 4, goes beyond that, it is ultra vires. The authority conferred on the Lord Chancellor by s. 5, sub-s. 5, of the Act by rules to "make provision for the practice and procedure to be adopted for the purposes" of the section is of a limited character and does not entitle the rule-making authority to go beyond the substantive provisions of the Act. Interest allowed by the Court in an administration action under Order LV., r. 63, of the Rules of the Supreme Court is not a debt. Interest payable under a contract or by the law merchant stands on a different footing, and I raise no objection to the allowance of interest on the debt of J. Wild & Co. if by the terms of their contract it carries interest. As to the other debts, it is enough to rest my argument on the ground that the custodian objects to pay the interest, as he is entitled to do, under s. 5, sub-s. 2, of the Act. Moreover, the argument on the part of the creditors involves the proposition that all debts, including debts due by the enemy to creditors resident in neutral countries, must be paid out of the property vested in the custodian in the same way as if the enemy had been a deceased person whose estate was being administered by the Court, which is entirely inconsistent with the obvious intention and other provisions of the Act.

Mathew, K.C., in reply. The right of the custodian to refuse is limited by the proviso in s. 5, sub-s. 2, which goes to the sufficiency of the property only.

Cur. adv. vult.

June 1. YOUNGER J. delivered a written judgment, in which, after stating the facts and the directions which he was asked to give to the Master by the summons as above set out, he continued: I have now to determine whether directions to that effect shall be given.

The Trading with the Enemy Amendment Act, 1914, is not, primarily at least, an Act for the benefit of creditors at all. In the preamble, which recites that "it is expedient to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war . . . . in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies," the payment to their creditors of the debts of enemies out of such money and property is not mentioned or even referred to, and the secondary position which such creditors occupy under the Act is made very apparent by the provisions of s. 5, which prescribe the manner in which enemy property vested in the custodian under s. 4 shall be held and dealt with by him. That section, so far as is material to the present purpose, and as now amended by the Trading with the Enemy Amendment Act, 1916, s. 12, is as follows: "(1.) The custodian shall, except so far as the Board of Trade or the High Court or a judge thereof may otherwise direct, and subject to the provisions of the next succeeding sub-section, hold any money paid to and any property vested in him under this Act until the termination of the present war, and shall thereafter deal with the same in such manner as His Majesty may by Order in Council direct. (2.) The property held by the custodian under this Act shall not be liable to be attached or otherwise taken in execution, but the custodian may, if so authorised by an order of the High Court or a judge thereof, pay out of the property paid to him in respect of that enemy the whole or any part of any debts due by that enemy and specified in the order: Provided that before paying any such debt the custodian shall take into consideration the sufficiency of the property paid to or vested in him in respect of the enemy in question to satisfy that debt and any other claims against that enemy of which notice verified by statutory declaration may have been served upon him." Then sub-s. 5 provides: "In England and Ireland the Lord Chancellor and the Lord Chancellor for Ireland may by rules, and in Scotland the Court of Session may by act of sederunt, make provision for the practice and procedure to be adopted for the purposes of this and the last preceding section." The power given to the Lord Chancellor to make provision for the practice and procedure to be adopted for the purposes (inter alia) of s. 5 of the Act does not, it will be noticed, give him authority to extend or modify in any way the substantive provisions of the Act. Rules under the Act have been made, and to these I may now refer. The relevant rule is r. 4, and it is as follows:—Sub-r. 1: "Any application under section five (2.) of the Act for payment out of property vested in the custodian of any debt or debts shall, if made to the Court or judge by whose order the property was vested in the custodian, be made and dealt with as follows." Sub-r. 2: "The application shall be deemed a subsequent application for the purposes of the last preceding rule." Sub-r. 3: "The Court or judge may on the hearing of the application direct all such accounts and inquiries as may be necessary or proper for the purpose of ascertaining the total debts and claims having priority to or ranking with the debt or debts proposed to be paid in whole or part, and (if thought fit) the property available for the payment of such debts and claims, and may for that purpose direct the custodian or any party to issue such advertisements and require such proof by statutory declaration or otherwise as may be expedient. And the custodian may, if he think fit, carry out the duties imposed on him by the proviso to section five (2.) under the direction of the Court."

Then sub-r. 4, which is the important rule for the present purpose, is: "In directing any payment or payments under section five (2.) the Court or judge shall act in accordance with the ordinary rules and practice of the Chancery Division of the High Court in the administration of estates, but so nevertheless that the Court shall not be bound to inquire into or take into account or to cause the custodian to inquire into or take into account debts and claims against the enemy to any greater extent than provided for by the proviso to section five (2.)." Having regard to the limited powers conferred upon the rule-making authority, it is, I think, clear that these rules cannot give to creditors any rights to which they are not entitled under the Act. Accordingly, although the argument on behalf of the creditors was mainly rested on the rules, it is obvious that, if that argument is to prevail, it must be one which is not destroyed by the terms of the Act itself. I return therefore to a consideration of the provisions of the Act so far as they deal with this subject.

Now the provisions of sub-s. 2 of s. 5 are very significant in connection with the matters which now call for decision. While by that sub-section the custodian is not empowered to pay out of the property paid to him in respect of an enemy the whole or any part of any debt due by that enemy unless so authorized by an order of the High Court or a judge thereof, the Court cannot require the custodian to make any such payment against his will. The decision whether payment shall or shall not be made rests ultimately with him, subject only to the proviso that before paying any debt the custodian must satisfy himself that he retains property paid to or vested in him in respect of the enemy in question sufficient to satisfy that debt and any other claims against that enemy of which notice verified by statutory declaration may have been served upon him. In other words, no payment is to be made unless both the custodian and the Court agree that it shall be made: the custodian is not by the Act required to pay any debts unless he shall so think fit: a fortiori he is not required to pay all debts. He is, however, precluded from paying anything to one creditor unless he has left, in respect of the enemy, but not necessarily for payment, a sufficiency to satisfy that debt and any other claims against the enemy of which he has the prescribed notice. Of course, in practice, no difficulty arises in the exercise by the custodian of his powers. There is never any conflict between him and the Court as to their exercise: he welcomes the protection of the order of the Court and concurs and assists in the taking of such an inquiry as is pending in the present case with a view to making payment in accordance with its result. But, as I have said, the wording of the Act as to his powers is significant. And as a result of the discussion which has taken place on the present summons I am more than ever satisfied that it is intentional, and I have been convinced by the arguments to the contrary on behalf of the claimants here that, unless Parliament was prepared to devise a special scheme of administration applicable to the case, some such discretion vested either in the custodian or the Court was essential to the proper working of the Act. For these arguments, based, it is true, primarily upon the rule to which I have referred, have, in order that this claim to interest might succeed, gone, and have necessarily gone, to this, that all debts of an enemy which would have been provable had he been a deceased person whose estate was being administered by the Court must be paid out of the property vested in the custodian so far as that property in a due course of administration will extend. The claim is comprehensive indeed. The debts to be admitted would clearly include debts due by the enemy to creditors resident in neutral countries, and none the less that the war imposes no barrier whatever to these creditors recovering their debts from the enemy in his own country; even debts due to enemy subjects resident or carrying on business in such neutral countries would not be excluded; and certainly there would be included debts to creditors resident in allied countries, and none the less that there may in those countries be assets of the enemy more adequate to meet local claims than are his assets here adequate to meet British claims upon them.

Indeed, to take by way of example such a case as the present, that of a vast undertaking like Krupp's with creditors all over the world, the argument would require the Court to charge upon this relatively small fund in the hands of the custodian all the verified claims against Krupp's, say, of German subjects resident and carrying on business in the United States, the result of which would be that the fund, or the greater part of it, instead of, in the words of the preamble to the statute, being preserved "with a view to arrangements to be made at the conclusion of peace," might have to be transmitted to enemy subjects in the United States of America during the continuance of the war. And, if the argument be well founded, the Court would have no power to prevent that result.

Of course that is not the intention of the Act, and it is one merit of the construction which I have ventured to place upon s. 5 that such a consequence is thereby effectively excluded, for the authority of the Court will not, save in the most exceptional circumstances, be extended to the payment of any foreign claims. The Court will even withhold its authority to the payment of any claims at all in cases where it is satisfied that the purpose of the Act can be best secured by leaving the funds in the hands of the custodian and where the refusal of its authority involves no injustice to the creditor. And this may quite frequently be the case, because the fact that the enemy has assets here is, quoad the creditor, often the merest accident; if he is not paid his debt out of them, he is in no worse case than the creditor of an enemy with no assets here; and if his claim is one in respect of which service out of the jurisdiction upon the enemy would not be allowed, he is in no way prejudiced by the fact that the funds in the hands of the custodian are not liable to be attached or otherwise taken in execution. The solvency and resources of the enemy may also be very relevant considerations. The truth of the matter is that the funds in the hands of the custodian being in a case like the present, and indeed in most cases under the Act, only a proportion or even the smallest fraction of the assets of the enemy ultimately available for payment of his debts, all analogies resting upon the assumption that the assets under the Court's control are the whole of the assets so available, are, in my view, fallacious, and their application leads to results which are entirely at variance with the express provisions of the statute itself.

Now the custodian objects to this claim for interest on debts which carry none. I see no reason why it should be allowed. On that short ground, therefore, I hold that it must be rejected.

But there is another ground upon which this special claim to interest upon a debt which carries no interest ought, I think, be disallowed, if I have power to disallow it. Whatever be the ultimate destination of the funds in the hands of the custodian under the Order in Council hereafter to be made under s. 5, sub-s. 1, of the Act, it is plainly desirable that no payment out of enemy money should be authorized by the Court which could not by law be justified as against the enemy himself. The fund should be kept intact for restoration, if need be, at the end of the war, less only such payments out of it for administration or otherwise as the enemy could not himself validly or reasonably object to if he were here to oppose them.

Now the Act says nothing about interest on their debts being payable to creditors out of the funds in the hands of the custodian, and, in my opinion, if, apart from the Act, such debts carry no interest, the Act itself is no warrant for allowing it. In these circumstances I would not, unless my duty were otherwise imperative, take upon myself the responsibility of authorizing it.

In my opinion, therefore, so far as the Act is concerned, the direction to the Master must be that he is not to compute interest upon any debts which by law carry no interest, Order LV., r. 63, for the reasons I have given, having, in my opinion, no application to claims under the Act. As to debts which by contract with the enemy carry interest, then the interest is, as against the enemy, part of the debt just as much as the principal. In the present case, where the funds are ample for payment of all admitted claims in full, and where, therefore, the rights of other creditors do not intervene, the Master will compute interest at the rate fixed by the agreement under which the debt arises. Whether the debt of Messrs. Wild & Co. does or does not carry interest the Master will ascertain and determine.

So far I have dealt with the case under the Act alone, but, as I have said, the argument of Mr. Mathew was based mainly upon r. 4 to the terms of which I have already referred. It was said that r. 4 necessarily introduced Order LV., r. 63, of the Rules of the Supreme Court, which I may now read: " A creditor whose debt does not carry interest, who comes in and establishes the same before the judge in chambers under a judgment or order of the Court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of four per cent. per annum from the date of the judgment or order out of any assets which may remain after satisfying the costs of the cause or matter, the debts established, and the interest of such debts as by law carry interest." It was contended in the present

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case that by analogy to that rule the vesting order is the counterpart of the order for administration and that interest should be computed from its date. Now it is perhaps enough for me to say that I am by no means satisfied on the construction of r. 4 that it has any such effect as is claimed for it, and I cannot think that any such effect could have been intended. But I have already indicated the wide-reaching consequences of such an effect being attributed either to the Act or the rule, and if I be right in the construction which I have placed upon the Act it is plain from the reasons which I have given that the rule, should it have the meaning suggested, is ultra vires. The rule-making authority is not, as I read the Act, thereby empowered to deprive either the custodian or the Court of a discretion vested in them by the Act; and, so interpreting the Act, I conceive it to be my duty to obey it regardless of any direction contained in any rule which is not in accordance with its provisions and is not otherwise validated by lawful authority.

The result is, whether the reason for it turns upon the Act or the rules, that the direction to the Master must be that which I have already indicated. (1)

[His Lordship further directed the costs of all parties to be paid out of the funds in the hands of the custodian, and as the enemy company had rendered great assistance he allowed them their costs.]

Solicitors: *Nicholson, Graham & Jones; Bircham & Co.; Roney & Co.; Coward & Hawksley, Sons & Chance.*

A. C.

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(1) By the Trading with the Enemy (Vesting and Application of Property) Amendment Rules, 1916 (No. 2), of June 6, 1916, rr. 4 and 5 of the rules referred to in the report are now annulled and other rules substituted. See W. N. [1916], pt. ii. p. 272.

THARP *v.* THARP.

C. A.
1916
June 5.

[1915 T. 533.]

Will—Settled Estates—Limitations to A. for Life, Remainder to B. in Tail—Codicil giving A. an exclusive Power by Deed or Will to appoint to a Class—A. a Member of the Class—B. not a Member—Revocation of Codicil—Restoration of Codicil on A.'s Promise not to interfere with B.'s Succession—Appointment by A. to himself in Fee—Fraud—Promise enforced—Invalid Appointment.

Appeal from a decision of Neville J.; reported [1915] W. N. 410; [1916] 1 Ch. 142.

By the will and five codicils of a testator real estates were settled to the use of his wife during widowhood, remainder to the use of A. for life, remainder to the use of the first and every other son of A. successively in tail male, remainder to the use of such person or persons of a special class as A. should by deed or will appoint, remainder in default of such appointment to B. for life, remainder to the first and every other son of B. successively in tail male, with remainders over.

A. was married, but had no children. He was a member of the class; B. was not. The testator's wife, desiring that B. should not be excluded from succeeding to the estates, induced the testator to make a sixth codicil by which he revoked the power of appointment given to A. by the fifth codicil. On hearing of this A. had an interview with the testator's wife at which he gave her his written promise to leave the estates to B. on acquiring the power to do so if she would get the testator to revoke the sixth codicil. The testator's wife communicated this promise to the testator, who thereupon destroyed the sixth codicil. After the testator's death A. by deed appointed the estates to himself in fee on failure of his issue male. B. brought an action against A. to enforce the promise.

Neville J. held that the appointment was fraudulent and void, for that A. could not exercise the power so as to interfere with B.'s right of succeeding to the estates.

The defendant appealed against this decision.

Romer, K.C., and *Owen Thompson*, for the appellant.

Maugham, K.C., and *Fairfax Luxmoore*, for the respondent.

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In the course of the argument a consultation was held between the parties, as a result of which an agreement was arrived at, and the case was settled on terms which were not mentioned to the COURT (Lord Cozens-Hardy M.R., Pickford L.J., and Warrington L.J.).

Solicitors for appellant: *Hasties.*
Solicitors for respondent: *Corbould, Rigby & Co.*

H. C. R.

EVE J.
1916
May 30, 31.

In re SMITH.
LAWRENCE *v.* KITSON.

[1913 S. 1777.]

Conflict of Laws—Lex loci contractus—Lex situs—Foreign Immovables—Equitable Charge—Legal Mortgage—Insolvency of Mortgagor's Estate—Rights of Creditors.

By a deed of October 9, 1907, a testator, in consideration of 1000*l.* then expressed to be owing by him to his two sisters, charged all his share and interest in an estate in the island of Dominica, West Indies, to secure the repayment of this sum, and of such further sums as should thereafter be advanced by his sisters, and he agreed to execute a legal mortgage of the said property to them to secure all such principal money and interest, whenever required to do so. On July 17, 1912, a further charge for 1000*l.* on the same property was indorsed upon the first deed. By his will the testator gave all his estate wherever situated to trustees upon certain trusts, and died insolvent in 1913 without having executed any legal mortgage of the property. By the law applicable to immovables in Dominica the equitable charge was not sufficient to create a valid incumbrance upon this property.

Upon a summons issued by the two sisters in a creditors' action for the administration of the testator's estate:—

Held, that the sisters were entitled to have a legal mortgage of the foreign land executed in their favour to secure the moneys intended to be secured by the two documents. The contract was to be construed by the law of England, and the death of one of the parties could not operate to change the law by which it was to be construed and prejudice the right of the other party to have specific performance.

British South Africa Co. v. *De Beers Consolidated Mines* [1910] 2 Ch. 502 followed.

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THIS was a creditors' action for the administration of the estate of Basil Wickings Smith, who died on February 12, 1913. An administration order was made on June 30, 1913.

By his will, dated October 24, 1909, the testator appointed his wife, the defendant Agnes Ingham Wickings Smith, and his son, Basil Guildford Wickings Smith, to be his trustees, and gave them all his estate of every nature and kind whatever, and wheresoever situated, upon certain trusts, and appointed his son, B. G. W. Smith, to be sole executor. Letters of administration with the will annexed were granted to the defendant John G. Kitson as attorney to B. G. W. Smith, who was resident abroad and had disclaimed the trusteeship. B. G. W. Smith was subsequently drowned in the *Lusitania* disaster. On April 16, 1913, the testator's widow appointed J. G. Kitson trustee of the will, and on February 19, 1915, administration de bonis non was granted to her.

Part of the testator's estate consisted of one fifth share in plantations, lands, messuages, mills, houses, &c., situate in the parish of St. Patrick, in the island of Dominica, in the West Indies, and known as the "Geneva Estate." On January 5, 1916, the trustees of his will were registered in the Presidency of Dominica as proprietors of one fifth share of the "Geneva Estate."

By a deed dated October 9, 1907, B. G. W. Smith, in consideration of 1000*l.* then due and owing by him to Agnes Smith and Emily Maude Smith (his sisters) as tenants in common, charged all his share and interest in the "Geneva Estate" for securing the repayment to A. Smith and E. M. Smith of the sum of 1000*l.*, and of such further sums as should thereafter, during the continuance of the security, be advanced by them, or either of them, to him; and he thereby agreed to execute a legal mortgage of the said property to A. Smith and E. M. Smith for securing all such principal money and interest whenever required to do so. This money was not in fact advanced by the sisters, but securities were lodged by them with the testator's bankers to secure a loan of 1000*l.* by the bankers

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to their brother. Further securities were lodged by them with the bankers to cover further loans. On July 17, 1912, the testator gave to the Misses Smith a further charge for 1000*l.* on the "Geneva Estate" in respect of a money loan of that amount which they had advanced to him personally. This was indorsed upon the prior equitable charge of October 9, 1907. A further sum of money was afterwards advanced by one of the sisters.

On April 11, 1916, the two sisters issued a summons asking for a declaration that they were entitled to a charge of 1583*l.* 8*s.* 3*d.* and 2883*l.* 14*s.* 5*d.* respectively on the "Geneva Estate," and for an order that a legal and proper mortgage of the testator's share in the estate be executed by the trustees in their favour. There was evidence that the two charges were not, at the time when they were respectively executed, sufficient under the laws of the Leeward Islands (to which Dominica belonged) to create any incumbrance upon the property to which they referred, and they also failed to comply with the requirements of certain other Acts.

E. F. Buckley, for the summons. These two ladies are entitled to a charge upon the testator's real estate in Dominica. The testator had no debts there. The law of England applies to the contract between the parties, and subsequent events cannot affect what has gone before; the matter must be dealt with in personam. The only question is whether the debtor's death and the insolvency of his estate make any difference. I submit not.

J. E. G. de Montmorency, for the creditors. I do not admit that the charge covers all the money claimed by the sisters, even if it is a good charge. By the law of the Leeward Islands this charge is not enough to pass the land in Dominica, and there is no obligation to execute a legal mortgage. The lex situs applies here, not the lex loci contractus: *Waterhouse* v. *Stansfield* (1); while *Ex parte Pollard* (2) was a decision to the contrary effect. The law was unsettled under the early cases, but the opinion of the text-writers is almost unanimous: Foote's Private International Jurisprudence, 4th ed. pp. 190, 206, 354; Westlake's Private International Law, 5th ed. pp. 230, 234, 305; Dicey's Conflict of Laws, 2nd ed., pp. 503, 810, note 17. Other decisions show that the lex situs is

(1) (1852) 10 Hare, 254. (2) (1840) Mont. & Ch. 239, 250.

applicable to this case: *Ex parte Borrodaile* (1); *Norton* v. *Florence Land and Public Works Co.* (2); *Ex parte Melbourn* (3); *Bank of Africa* v. *Cohen.* (4) [He also referred to *British South Africa Co.* v. *De Beers Consolidated Mines.* (5)]

On the facts, no injustice would be done to these ladies; they would get a dividend with the other creditors. It is impossible to perfect this contract; it is now worthless.

E. F. Buckley in reply. The fact of the testator's death cannot affect the construction of the contract giving the equitable charge.

EVE J. The question involved in this application has been very ably argued by Mr. de Montmorency on behalf of the plaintiff and the other unsecured creditors of the testator, and it resolves itself into this, whether in the events which have happened the contract entered into by the testator ought to be specifically performed by those who now represent his estate, or whether, having regard to the subject-matter of the contract and the subsequent events, the applicants who claim the benefit of the contract are no longer entitled to enforce it. [His Lordship stated the facts and continued:] Can the two sisters now require the testator's legal personal representatives to execute a legal mortgage in their favour in accordance with his contract? The answer, it is said, depends upon the question what law is to be applied, the lex situs or the lex loci contractus. If the testator were still alive the right of these ladies to their mortgage is established, I think, by the decision of the Court of Appeal in *British South Africa Co.* v. *De Beers Consolidated Mines.* (5) Cozens-Hardy M.R. there says: "In my opinion an English contract to give a mortgage on foreign land, although the mortgage has to be perfected according to the lex situs, is a contract to give a mortgage which—inter partes—is to be treated as an English mortgage and subject to such rights of redemption and such equities as the law of England regards as necessarily incident to a mortgage." And to the same effect is what Kennedy L.J. says towards the end of his judgment.

Mr. de Montmorency does not dispute that, if it were still a question between the applicants and the testator himself, the Court could and would call upon him specifically to perform his contract by executing, in favour of the applicants, a proper legal mortgage of the foreign land to secure the moneys intended to be secured by these two documents of 1907 and 1912 and the legal mortgage thereby provided for, but he contends that the Court of Appeal dealt in terms only with the rights inter partes, and that there is nothing in the judgment to preclude him from insisting that the lex situs ought now to be applied because the interests of third parties have arisen in consequence of the testator's death and the order for the administration of his insolvent estate. I do not think that argument is sound. I take it that what the Court has determined is this, that contracts of this description are to be construed by "the proper law," as the late Mr. John Westlake calls it—that is to say, in this case, by the law of England; and I do not think the death of one of the parties to the contract can operate to change the law by which the contract is to be construed and prejudice the right of the other party to have specific performance of the contract. When once the law applicable to the contract has been ascertained that law remains applicable. Moreover, in this case I doubt whether it is accurate to say that rights of third parties have arisen by reason of the death of the mortgagor. His unsecured creditors, whether he were alive or dead, would be prejudiced by the giving of a charge on his assets to particular creditors; but this in itself is no ground for depriving the particular creditors of their rights, and the only result of his death and the order for the administration of his estate is to make his assets immediately available for those who are entitled to participate in them in accordance with their legal rights. In my opinion, the applicants are entitled to call upon the persons in whom the interest of the testator is now vested to execute the legal mortgage which he had contracted to give them.

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(1) (1835) 2 Mont. & A. 398.
(2) (1877) 7 Ch. D. 332.
(3) (1870) L. R. 6 Ch. 64.
(4) [1909] 2 Ch. 129.
(5) [1910] 2 Ch. 502, 515, 524.

As there is some doubt as to what sums ought properly to be included in the security, an account will be directed in chambers to ascertain the correct amount.

Solicitors for plaintiff: *Beaumont & Son.*
Solicitor for defendants: *H. E. Lawrence.*

G. M.

CASSEL *v.* INGLIS.

[1916 C. 1058.]

ASTBURY J.
1916
May 24, 25;
June 1.

Stock Exchange—Member—Application for Re-election—Discretion of Committee—Application refused—No Duty to give Reasons for Refusal.

A member of the Stock Exchange is elected for one year only and comes up annually for re-election under rule 21, which provides that the committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant.

Rule 35 provides that a member intending to object to the re-election of a member, the admission of a candidate, or the readmission of a defaulter shall communicate the grounds of his objection to the committee by letter previously to the re-election or ballot:—

Held, that a committee who in the bona fide exercise of their discretion under rule 21 do not deem an applicant eligible for re-election are not bound to give any reasons for their decision, and (*semble*) even if an individual objection were lodged under rule 35 they would not be bound to acquaint the applicant with the particulars of that objection so as to enable him to answer it.

Reg. v. *Ipswich Corporation* (1705) 2 Ld. Raym. 1232; *In re Wilkes's Charity* (1851) 3 Mac. & G. 440; *Hayman* v. *Governors of Rugby School* (1874) L. R. 18 Eq. 28; *Ex parte Penney* (1872) L. R. 8 Ch. 446; and *In re Coalport China Co.* [1895] 2 Ch. 404 applied.

Fisher v. *Keane* (1878) 11 Ch. D. 353; *Labouchere* v. *Earl of Wharncliffe* (1879) 13 Ch. D. 346; *Russell* v. *Russell* (1880) 14 Ch. D. 471; and *Rigby* v. *Connol* (1880) 14 Ch. D. 482 (expulsion cases); and *Board of Education* v. *Rice* [1911] A. C. 179 and *Local Government Board* v. *Arlidge* [1915] A. C. 120 (departmental tribunal cases) distinguished.

MOTION.

The undertaking called the Stock Exchange, originally constituted under a deed of settlement of March 27, 1802, is now governed by a deed of settlement of December 31, 1875, and rules made thereunder. The undertaking is vested in trustees and managers. The assets consist of the buildings, furniture, and money. The capital is 240,000*l.* nominal value, divided into 20,000 shares on which 12*l.* each is deemed to be paid up. These shares are held by the proprietors, who make the rules for the management of the undertaking. The liability is unlimited.

By clause 1 "the proprietors" means the registered shareholders and "members" means the persons from time to time admitted to attend and in their own right to transact business at the Stock Exchange.

By clause 2 the purposes of the undertaking are the maintenance of the buildings, the provision of furniture and accommodation, and the employment of the buildings for buying and selling stocks and shares subject to regulations under or made pursuant to the deed.

By clause 21 no transfer of a share shall be made to a non-member, and by clause 22 no transfer shall be made to any person not approved by the trustees and managers, who shall have an absolute discretion as to rejecting any transfer, and shall not be bound to give any reason for rejecting it.

By clause 23 the executors or administrators of a deceased proprietor are not entitled to be registered as proprietors, but may transfer the share.

By clause 24 every proprietor ceasing to be a member and the executors or administrators of a deceased proprietor shall within two years of cesser or death transfer his shares to some other person, and in default the trustees or managers may purchase or sell them under clause 25.

By clause 50 (*k*) the trustees and managers fix the entrance fees and annual subscriptions.

By clause 90 the members are on March 20 in every year to elect thirty members as a "committee for general purposes" to hold office for twelve months from March 25 next following.

By clause 91 no person shall be elected to the said committee who shall not have been a member for the space of five years immediately preceding the day of election.

By clause 94 the committee for general purposes shall admit such persons, whether proprietors or not, as they shall think proper to attend the Stock Exchange for transacting the business of a stockbroker or jobber for one year commencing March 25 then instant or last preceding the admission on payment of the entrance fee (if any) and annual subscription for the time being fixed by the trustees and managers for such admission, and subject to any rules and regulations from time to time made by the committee. The money paid by the members for the liberty of attending and transacting business shall be paid to the trustees and managers for the general purposes of the undertaking.

By clause 95 the committee for general purposes shall regulate the transaction of business on the Stock Exchange and may make rules respecting (inter alia) "the admission, expulsion, or suspension of members."

By rule 16 the committee may expel or suspend any member who may violate any of the rules, or who may fail to comply with any of the committee's decisions, or who may be guilty of dishonourable or disgraceful conduct.

By rule 21 the committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant. A member re-elected, admitted, or re-admitted shall become liable for the amount of subscription and fees fixed by the trustees and managers.

By rule 22 every member or applicant for re-election, admission, or re-admission shall declare whether he proposes to act as a broker, dealer, or clerk, or that he is not engaged in active business, and no member shall alter his status from broker to dealer or from dealer to broker without one month's notice to the committee.

By rule 23 a member desirous of being re-elected shall in each year address to the secretary a letter in form 1 in the appendix. (This form asks for re-election for a year.)

By rule 26 a candidate for admission must obtain the nomination of a member willing to retire in his favour, or of a former member, or of the legal personal representatives of a deceased member.

By rule 32 a candidate for admission must not be under twenty-one and must be recommended by three members. Each recommender must engage to pay 500*l.* to the candidate's creditors, in case the candidate is declared a defaulter within four years of his admission. (The form of application asks for admission for a year. See appendix, form 4.)

By rule 35 a member intending to object to the re-election of a member, the admission of a candidate, or the re-admission of a defaulter shall communicate the grounds of his objection to the committee by letter previously to the re-election or ballot.

By rule 37 the election of new members shall be by ballot and must be carried by a three-fourths majority in a committee of not less than twelve members.

By rule 38, if an applicant for re-election, admission, or re-admission be rejected, he shall not be balloted for again before March 25 then next ensuing.

By rule 39 a member on his election shall, before exercising any of the privileges of membership, become a proprietor in the Stock Exchange by acquiring one share in the case of a member admitted with two sureties, or three shares in the case of a member admitted with three sureties. The secretary shall not issue an admission notice to a new member until it has been reported to him by the secretary to the trustees and managers that the new member has been duly registered as a proprietor of the required number of shares.

By rule 73, if a non-member shall make any complaint against a member, the committee shall in the first place consider whether the complaint is fitting for their adjudication, and, in the event of their deciding in the affirmative, the non-member shall, previously to the case being heard by the committee, sign the form of reference 31 in the appendix. Under form 31 the non-member undertakes to be bound by the reference as if he were a member, and not to institute other proceedings.

In August, 1914, the Stock Exchange was closed owing to the war. It was reopened on January 4, 1915, subject to certain temporary regulations. Temporary regulation 2 provided that the following only will be admitted:—(*a*) British-born members or clerks. (*b*) Naturalized members or clerks who have re-exhibited their letters of naturalization to the committee and, in the case of naturalized members or clerks of enemy origin, have satisfied the committee that they have been denationalized in their country of origin.

The plaintiff was born in Germany. In 1900 he left that country and established his permanent home in England. He was shortly afterwards denationalized as a German subject, and on April 12, 1906, he was naturalized as a British subject. From 1900 he was engaged in Stock Exchange business, first as a remisier of and afterwards as a partner in Stock Exchange firms. In 1908 he purchased a nomination and was admitted a member of the Stock Exchange.

He paid an entrance fee of 500 guineas, provided three sureties of 500*l.* each, and bought three shares which cost about 500*l.* He was regularly re-elected at the March elections before the war and paid 40 guineas a year to the trustees and managers. He complied with all the rules, and no complaint was ever made against him. On the reopening of the Stock Exchange on January 4, 1915, he complied with temporary regulation 2 as to proving his naturalization here and denationalization in Germany, and was allowed to enter the Stock Exchange as before, and in March, 1915, he was deemed eligible and re-elected a member for the year 1915-16.

On May 8, 1915, in consequence of the feeling then prevailing against members of German and Austrian origin, the committee wrote advising them to keep away from the House at present. The plaintiff duly complied with this suggestion and did his business elsewhere.

On November 10, 1915, certain members belonging to the Anti-German Union and other members in sympathy with their views presented a petition to the committee against the re-election of members of German or Austrian origin.

On January 26, 1916, the committee wrote to the petitioners saying " The petition . . . . has received most careful consideration. The committee are fully alive to the possibility that there may be naturalised members of enemy birth whose membership of the Stock Exchange is undesirable. Quite apart however from legal difficulties they are not prepared to deal with the naturalised German and Austrian members as a body on the lines laid down in the petition. In their petition the memorialists recognise the fact that there are cases in which the refusal to re-elect would be neither desirable nor fair, and that they wish exceptions to be made in such cases. They however throw the onus of selection on the committee who are thereby called upon to accept sole responsibility. The committee wish to point out that they are in no better position than the rest of the House for discriminating between members unless an objection to any individual member is submitted to them. In this connection the committee wish to call the attention of the members to their rights and obligations under rule 35 and to say that they on their part are fully prepared to discharge the duty imposed upon them by carefully considering and adjudicating upon any objection to the re-election of a member communicated to them in accordance with that rule. Such communications will in all cases be treated as confidential."

On or about March 6, 1916, the plaintiff applied for re-election. On March 9, 1916, a meeting largely attended by members of the Stock Exchange, some of whom, including the chairman, Johnstone, formed a sub-committee of the Anti-German Union, passed a resolution to oppose the re-election of all persons of alien enemy birth elected subsequent to March, 1895, with the exception of those who were serving or who had sons serving in the Imperial forces. On the same day Johnstone, the chairman, acting on behalf of the Anti-German Union, wrote to the committee informing them of the resolution and stating that of the 485 members present 408 voted for the resolution, 41 against, and 36 did not vote, and that those voting for the resolution were requested by so doing to authorize the Anti-German Union to lodge objections against all members coming within the resolution and stating that "The grounds of our objections are that the members in question are of alien enemy birth. We will send you a list of the members as soon as we can prepare it." This list was sent the next day.

On March 10, 1916, the committee replied. After setting out their letter of January 26, 1916, declining to deal with objections en bloc, they proceeded: "This letter discloses a policy from which the committee are unwilling to depart and they are not prepared to consider the general notice of objection based on an arbitrary date as a sufficient objection under rule 35. Apart altogether from a personal legal liability to themselves, which may or may not be remote, the committee are not prepared to submit the House to a dislocation of business and certain of its members to individual hardship which the adoption of the policy advocated at the meeting would entail. The dislocation of business would affect firstly the clients of the members rejected whose interests under the emergency rules the committee have pledged themselves to safeguard, and secondly the members who have accounts open with the members who were rejected. The hardship would consist in loss of the privileges of membership and of business to many members—enemy born it is true, but of undoubted loyalty—and to their partners of British birth. For these reasons the committee feel bound to proceed with the consideration of the re-election of these members as they are required to do under rule 21."

The letter of March 10, 1916, was posted up in the Stock Exchange on the same day. There was no evidence that any subsequent objection to the plaintiff's re-election was made under rule 35.

On March 9, 1916, Basil Wilson, hon. secretary of the Anti-German Union, wrote to the plaintiff saying "We beg to inform you that an objection to your re-election to membership of the Stock Exchange has been lodged with the committee, but should you inform us at an early date that you are or have a son serving with the Imperial forces the objection will be withdrawn." The plaintiff received this letter on March 10, 1916, but there was no evidence that its existence became known to the committee. The plaintiff was a bachelor past military age.

On March 11, 1916, the committee decided not to act on the en bloc resolution of March 9, but to proceed with the re-election of members of German and Austrian origin subject to any individual objections under rule 35. On the same day the plaintiff received a letter from the committee requesting him to attend on March 15, when the re-election of foreign-born members would be considered. The plaintiff and others attended, but were told the committee would not require to trouble them.

On March 15, 1916, the committee wrote to inform the plaintiff that he had not been re-elected. At this time the committee in fact re-elected 83 out of 99 applicants of German or Austrian origin, the remaining 16, including the plaintiff, being considered ineligible. Each case was dealt with separately. Protests being lodged, notices of motion to rescind the decision as to the 16 members were given, and were ultimately successful as to all but five members.

On March 21, 1916, the plaintiff wrote pointing out that he had not acted contrary to the Stock Exchange Rules or acted disloyally to his adopted country and asking the committee the reasons for their decision. On March 22, 1916, the committee replied that if he wished to attend that day's meeting the committee would hear him. The plaintiff attended. He was asked if he wished to add anything to his letter. He said he could add nothing, as he was ignorant of any charges against him. He asked to be informed of any charges in order to refute them. A member of the committee said "Is that all you have to say?" The plaintiff assented and was told he might withdraw. On March 24, 1916, the committee wrote to inform the plaintiff that the motion to rescind their previous decision had been submitted and lost.

On March 25, 1916, a new committee came into office, and the plaintiff, whose reputation had suffered owing to his non-re-election, again pressed to be told the charges against him, and offered an undertaking not to sue for defamation. In reply he was referred to rule 38 and informed that it would be open to him to apply for re-election for the year 1917-18, when the committee would duly consider anything he might wish to urge.

Ultimately on May 3, 1916, the plaintiff commenced this action against the old and new committee, and by a notice of motion dated May 11, 1916, and subsequently amended at the hearing, he asked, first, for a declaration that the decision given by the old committee on March 15, 1916, rejecting his application for re-election was invalid and inoperative and that the old committee had not duly determined that application, and that before that application was decided adversely to the plaintiff he was entitled to be informed of any objection to his re-election and to a proper opportunity of being heard in respect of that objection; and, secondly, for an order that the new committee should, notwithstanding the aforesaid decision, forthwith proceed to deal with the plaintiff's application in accordance with the above declaration.

The motion was treated as the trial of the action, and the evidence consisted of an affidavit by the plaintiff, an affidavit on behalf of the defendants, and documentary evidence. There was no cross-examination.

The plaintiff deposed to the main facts, his case being that there had evidently been some individual objection to him under rule 35 which he ought to have been given the opportunity of answering. He did not impeach the defendants' good faith in anything they had done.

The defendants gave evidence that the motions to rescind the sixteen rejections were considered separately. The non-re-elected members attended. Letters sent in on their behalf were read, and each member was allowed to make a statement. In five cases, including the plaintiff's, the motion was lost. The decisions were confirmed at the next meeting. The committee had not expelled the plaintiff for alleged misconduct. They did not re-elect him because, in the honest exercise of their discretion, they did not deem him eligible, and for no other reason.

Sir John Simon, K.C., and *Barrington-Ward*, for the plaintiff. Rule 21 provides that the committee " shall " on the first Monday in March re-elect such members as they shall " deem eligible " for the year commencing March 25. Now the rules and the deed of settlement must be construed as commercial documents having regard to their obvious intention and the practice thereunder. It is true that both the original election and annual re-election are expressed to be for a year only, but, having regard to the whole scope of the rules and deed of settlement, it is inconceivable that an original candidate can have been intended to purchase a nomination, pay 500 guineas for election, provide sureties for four years, and acquire a proprietary interest by purchasing shares merely to obtain one year's membership, unless he had a prima facie right to annual re-election quamdiu se bene gesserit. This is, at all events, the way the rules have hitherto been applied in practice.

The words " deem eligible " point to an act of adjudication, and not mere caprice : *Russell* v. *Russell* (1) ; and if there has been no proper adjudication the plaintiff, in virtue of his proprietary right, is entitled to relief in a Court of Equity : *Rigby* v. *Connol.* (2) Now a committee or any other tribunal which has to decide any question inter partes must fairly listen to both sides : *Fisher* v. *Keane* (3) (expulsion from club) ; *Labouchere* v. *Earl of Wharncliffe* (4) (expulsion from club) ; *Russell* v. *Russell* (5) (expulsion from partnership) ; *Rigby* v. *Connol* (2) (expulsion from trade union) ; *Board of Education* v. *Rice* (6) (departmental tribunal) ; *Local Government Board* v. *Arlidge* (7) (departmental tribunal).

[ASTBURY J. Expulsion cases are not strictly in pari materia. A member wrongly expelled remains a member. In the present case the plaintiff ceased to be a member in default of a positive act of re-election.]

(1) 14 Ch. D. 471, 479.
(2) 14 Ch. D. 482, 487.
(3) 11 Ch. D. 353, 362.
(4) 13 Ch. D. 346, 350.
(5) 14 Ch. D. 471, 478.
(6) [1911] A. C. 179, 182.
(7) [1915] A. C. 120, 132.

There was a prima facie duty on the committee to re-elect him apart from cause shown. The case is very analogous to the renewal of public-house licences. The justices have absolute discretion, but it must be exercised judicially, and renewals will presumably be treated on a different basis from original applications: *Sharp* v. *Wakefield*. (1) Where the question of refusing renewals for redundancy arises the justices must have some ground for differentiation between the various houses. They cannot select one or two haphazard for sacrifice: Paterson's Licensing Acts, 26th ed. pp. 470, 476. Now the defendants here are in this dilemma: If there was a personal objection under rule 35, they ought to have given the plaintiff the opportunity of answering it. If there was no such objection, they cannot have exercised their discretion properly, seeing that they have elected 94 out of 99 applicants whose cases cannot be differentiated from the plaintiff's case.

Sir Robert Finlay, K.C., *Upjohn, K.C.*, and *Douglas Hogg*, for the defendants. This is not a case of expulsion under rule 16 during a current year of membership. It is a mere refusal to re-elect for a fresh year under rule 21. That rule applies equally to the re-election of an old member or the admission of a new candidate. In each case the re-election or admission is for one year only, and in each case the committee, whether there has been an objection or not, are the sole judges of eligibility. It is a matter for their sole discretion, and they are no more bound to give reasons for their decision than directors on whom a discretionary duty of approving transferees of shares is cast: *Ex parte Penney* (2); *In re Coalport China Co.* (3) This is so although a refusal to approve a transferee deprives the transferor pro hac vice of his jus disponendi.

In the present case the committee dealt with each applicant of enemy origin separately under rule 21. Nationality was probably one of numerous elements taken into consideration, but at all events each application was fully considered. In the honest exercise of their discretion the committee did not deem the plaintiff eligible for re-election, and their decision cannot be reviewed. Even if it had been a case of expulsion, it is very doubtful whether the plaintiff as a member would have any right to relief in equity. The foundation of the equitable jurisdiction is a right of property: *Rigby* v. *Connol.* (1)

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(1) [1891] A. C. 173, 179, 181.

(2) L. R. 8 Ch. 446, 450.

(3) [1895] 2 Ch. 404.

Now the property in the Stock Exchange belongs to the proprietors. Members as such have no property, and proprietors as such have no right of membership. The plaintiff is more like a member of a proprietary club, and could not obtain an injunction against expulsion, but would be left to his remedy (if any) in damages: *Baird* v. *Wells.* (2)

Sir John Simon, K.C., in reply. In *Ex parte Penney* (3) and *In re Coalport China Co.* (4) the shareholder's jus disponendi was expressly limited by the articles. The proposed transferee was in the position of a new candidate for membership, and his fitness had to be considered accordingly. The present case is much nearer to the club cases. In *Baird* v. *Wells* (2) the plaintiff had no proprietary interest at all. If the club had been a limited company in which the plaintiff held shares which he had to part with on his expulsion the decision would have been different. In the present case the plaintiff had not only a licence to enter the Stock Exchange as a member, but he had a proprietary interest as a shareholder. That is a right that a Court of Equity will protect by injunction: *Jones & Sons* v. *Earl of Tankerville* (5); *Hurst* v. *Picture Theatres, Ld.* (6)

Cur. adv. vult.

June 1. ASTBURY J. (after stating the facts). The plaintiff has endeavoured to establish in his affidavit that the decision of the committee that dealt with his application for re-election was, in substance, one expelling him for misconduct, and that, as he was condemned unheard, that decision is contrary to natural justice and void. The defendants, on the other hand, submit that the plaintiff has drawn an entirely wrong inference from the facts; that, there being no individual objection raised to him under rule 35, after their ruling that they could not entertain the objection en bloc, the committee which dealt with his case did so in the honest exercise of their duty and discretion under rule 21 and did not deem him individually eligible for re-election; and that the plaintiff's case is based upon the fallacy that, having once been a member, he acquired a right to be re-elected.

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(1) 14 Ch. D. 482, 487.

(2) (1890) 44 Ch. D. 661.

(3) L. R. 8 Ch. 446.

(4) [1895] 2 Ch. 404.

(5) [1909] 2 Ch. 440, 443.

(6) [1915] 1 K. B. 1, 14.

In those circumstances I have to consider the matter in the light of the contract between the parties as appearing in the deed of settlement and the rules and regulations made thereunder, taking into consideration such principles and rules of law as, having regard to the circumstances and facts of the case, appear to me to be applicable. I desire to say, before proceeding further, that the fact that the plaintiff is of German birth, although an incident in the case, is wholly irrelevant to the question I have to decide. This question has been argued, and I propose to decide it, upon a contract and upon principles equally applicable to every member of the Stock Exchange, whether he be of alien or of British birth. The main issue in the case depends upon what, in the circumstances, were the powers and duties of the committee which dealt with the plaintiff's application for re-election in March last and whether they have been properly exercised and performed. This committee was a body having fiduciary duties to perform in the interests of the shareholders and the undertaking as a whole; one being to elect or re-elect all candidates and old members whom they should deem eligible to be members for one year commencing on March 25 last.

I quite agree with Sir John Simon that there are considerable differences between the cases of a new candidate and an old member coming up for re-election. The one has to comply with various rules as to entrance fee, sureties, purchase of shares, &c., whereas the old member, having previously done so, is exempt in these respects and has already acquired the status of a member of the Stock Exchange, and as such has entered, no doubt, into many continuing engagements and commitments. But, notwithstanding these differences of status, the duty of the committee at election time is, by contract between the parties, one and the same, that is, to elect those and those only whom they shall deem eligible to be members for the ensuing year. The performance of this duty may or may not be easier with regard to those who have been previously deemed eligible for membership than with regard to new candidates, but the test in each case is the same.

The contract in question is a commercial one, entered into by a commercial community for the regulation and management of a great commercial undertaking, and must be construed according to the business meaning and intent of the parties to it, to be collected from its terms as a whole. It is clear from this contract that the policy of the parties to it is that membership of the Stock Exchange is not, when once conferred, a permanent but only an annual right; that the sole power of determining whether this right of membership shall be acquired or re-acquired each March is conferred upon a committee elected by the members as a whole each year, inter alia, for this purpose; and I am of opinion that their decision, assuming that they act honestly and within their powers, is final and cannot be reviewed. In addition to the duty of election and re-election, the committee is further entrusted with a power of expelling or suspending a member during the currency of his year of membership, thus depriving him of his rights as a member for the unexpired residue of his term. No exercise of this power has occurred in the present case. The plaintiff has not been deprived of membership, but has failed to secure re-election for a fresh annual period from the committee, who alone had the power to confer upon him the privilege for which he applied.

In dealing with an application for re-election the committee may have to act under three different sets of circumstances: (1.) they may have before them the application alone; (2.) they may have to consider in addition an objection by another member under rule 35; and (3.) they may have to deal with a complaint made by a non-member under rule 73 which has not previously been adjudicated upon. With the third case I am not directly concerned. As to the second, the committee had declined to deal with the objection en bloc which had been made to the members of German and Austrian birth, and it is with their powers under rule 21 simpliciter that this action is mainly concerned. In all of these three cases, however, the primary duty of the committee is to exercise their discretion as to whether they deem the applicant for re-election eligible, and a question of vital interest to the Stock Exchange is whether, in a case where an objection has been lodged, they have the duty not only to arrive at their decision, but the right also solely to determine the method and procedure of doing so, as, in my judgment, they clearly have in a case where no such objection has been made.

On the facts as proved I might rest content with saying that the plaintiff has not shown that the committee acted otherwise than under rule 21 simpliciter, in which case it is, I think, impossible to contend with any chance of success that they were not entitled to select their own procedure and hear the plaintiff or not as they were advised; but, having regard to the submissions made by the plaintiff and to the arguments addressed to me, I propose to discuss also the powers and duties of the committee in the case of an objection having been lodged under rule 35, and, in particular, whether in this case also they can determine the method of procedure by which they deem it advisable to arrive at the decision to which they must ultimately come under rule 21. Both cases depend, in my judgment, upon the true meaning and intent of the parties to the contract, that is, upon its true construction. It is contended for the plaintiff that they cannot adjudicate upon a ground personal to an individual while refusing to acquaint him of the charge they are considering against him and refusing to hear him in his defence—that this, in other words, is a negation of adjudication—and that if they did not in this case adjudicate upon some ground personal to the plaintiff other than the general objection to his birth they have not exercised their discretion fairly and properly, because they have dealt with applicants of similar position in a different manner. This second contention assumes, and I think wrongly, that all members of German and Austrian birth were in other respects in the same position qua "eligibility generally." Assuming, as I will for the moment, that the plaintiff has, within the meaning of the judgment of Jessel M.R. in *Rigby* v. *Connol* (1), a right of property in the Stock Exchange undertaking of which he has been deprived, and which alone can give a Court of justice jurisdiction to entertain this action, the question arises whether he has brought his case within any of the rules which entitle the Court on this assumption to interfere in his favour, even assuming an objection to have been made against him under rule 35 other than the above-mentioned objection en bloc, of which fact there is no evidence.

In *Reg.* v. *Ipswich Corporation* (2) a corporation had dismissed its recorder, and Holt C.J. considered that if the corporation had merely returned that he held office at their pleasure, and that they had exercised their pleasure by dismissing him, the matter could not have been further inquired into, but as they had purported to dismiss him for a misdemeanour, it was competent for the Court to inquire into the sufficiency of their reasons.

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(1) 14 Ch. D. 482, 487.

(2) 2 Ld. Raym. 1232, 1240.

In *In re Wilkes's Charity* (1), where trustees had a certain power of selection, Lord Truro said: "The duty of supervision on the part of this Court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases. If, however, as stated by Lord Ellenborough in *Rex* v. *Archbishop of Canterbury* (2), trustees think fit to state a reason, and the reason is one which does not justify their conclusion, then the Court may say that they have acted by mistake and in error, and that it will correct their decision; but if, without entering into details, they simply state, as in many cases it would be most prudent and judicious for them to do, that they have met and considered and come to a conclusion, the Court has then no means of saying that they have failed in their duty, or to consider the accuracy of their conclusion."

In *Hayman* v. *Governors of Rugby School* (3), the Public Schools Act, 1868 (31 & 32 Vict. c. 118), having provided that the head-master of every school to which the Act applied should be appointed by and hold his office at the pleasure of the governing body, and Dr. Hayman having been dismissed and having invoked the assistance of the Court, Malins V.-C. said: "The apparent harshness of the power is mitigated by the appointment of men of high position, honour, and integrity as members of the governing body, by whom it is assumed that such power, arbitrary as it is in terms, would not be harshly, unjustly, or inconsiderately exercised. Assuming this to be the true construction of the Act, it was then contended on behalf of the plaintiff that this Court will control the proceedings of such bodies as this whenever it is satisfied that their powers have been exercised corruptly, unjustly, or for the purpose of effecting some collateral object, and that the circumstances of this case shew that the power of the governing body has been so improperly and unjustly exercised, and its exercise was so improperly brought about,

(1) 3 Mac. & G. 440, 448.

(2) (1812) 15 East, 117.

(3) L. R. 18 Eq. 28, 68.

that it is the bounden duty of the Court to interfere, and treat the resolution for the dismissal of the plaintiff as invalid, and to restrain them from carrying it into effect. I think the clear result of the numerous authorities cited on both sides in the argument of this case is that all arbitrary powers, such as the power of dismissal, by exercising their pleasure, which is given to this governing body, may be exercised without assigning any reason, provided they are fairly and honestly exercised, which they will always be presumed to have been until the contrary is shewn, and that the burthen of shewing the contrary lies upon those who object to the manner in which the power has been exercised. No reasons need be given, but if they are given the Court will look at their sufficiency."

In the present case the committee consisted of individuals chosen, no doubt, as men in whom the members of the Stock Exchange placed their fullest confidence. No charge of any sort or kind is made against their honesty or bona fides, and no reasons have been given by them for the discretion which they exercised in not re-electing the plaintiff which enable the Court to hold either that they have exercised it on wrong or insufficient grounds, or that the procedure which they thought fit to adopt for the purpose of arriving at their decision was, in the circumstances before them, other than fair and sufficient.

Turning to authorities dealing more particularly with rights and duties of an analogous character under commercial contracts, the Courts have been equally emphatic. In *Ex parte Penney* (1) the deed of settlement of a life insurance company provided that any shareholder should be at liberty to transfer his shares to any other person already a shareholder, or who should be approved by the board, and that no person not already a shareholder, or the executor, &c., of a shareholder, should be entitled to become the transferee of any share unless approved by the board. It was held, reversing the decision of Lord Romilly M.R., that the directors were not bound to disclose their reasons for rejecting a transferee, provided that they had fairly considered the question at a meeting of the board; and that, in the absence of evidence to the contrary, the Court would take for granted that they acted reasonably and bona fide. In this particular case a member had sold shares to Penney, a non-member. The directors considered the subject at a board meeting and declined to register the transfer. The directors further declined, when asked, to give any reason for having done so. James L.J. said (1): "No doubt the directors are in a fiduciary position both towards the company and towards every shareholder in it. It is very easy to conceive cases such as those cases to which we have been referred, in which this Court would interfere with any violation of the fiduciary duty so reposed in the directors. But in order to interfere upon that ground it must be made out that the directors have been acting from some improper motive, or arbitrarily and capriciously. That must be alleged and proved, and the person who has a right to allege and prove it is the shareholder who seeks to be removed from the list of shareholders and to substitute another person for himself. . . . But if there is no such corrupt or arbitrary conduct as between the directors and the person who is seeking to transfer his shares, it does not appear to me that this Court has any jurisdiction whatever to sit as a Court of appeal from the deliberate decision of the board of directors, to whom, by the constitution of the company, the question of determining the eligibility or non-eligibility of new members is committed. If the directors had been minded, and the Court was satisfied that they were minded, whether they expressed it or not, positively to prevent a shareholder from parting with his shares, unless upon complying with some condition which they chose to impose, the Court would probably, in exercise of its duty as between the cestui que trust and the trustees, interfere to redress the mischief, either by compelling the transfer or giving damages, or in some mode or other to redress the mischief which the shareholder would have had a just right to complain of. But if it is said that wherever any shareholder has proposed to transfer his shares to some new member, the Court has a right to say to the directors 'We will presume that your motives are arbitrary and capricious, or that your conduct is corrupt, unless you choose to tell us what your reasons were, and submit those reasons to our decision,' it would appear to me entirely altering (2) the whole constitution of the company as provided by the articles. I cannot conceive that any director would choose to accept office, or exercise the power entrusted to him, if he were liable to be called upon to say what the particular reasons were or the particular motive was which influenced him in coming to the conclusion that any person was not eligible as a shareholder. . . . . This conclusion, of course, in the absence of any suggestion to the contrary, or of any evidence to the contrary, we must take to be a bona fide conclusion on their part that, for some reason or other connected with the interests of the company, they did not think it fit to recognise that gentleman as a transferee." Mellish L.J. said (1): "But it is further contended that in order to secure the existing shareholder against being deprived of the right to sell his shares, the directors are bound to give their reason why they reject the transferee, and if they reject him without a reason that is a ground from which the Court ought to infer that they were acting arbitrarily. I cannot agree with that. It appears to me that it is very important that directors should be able to exercise the power in a perfectly uncontrollable manner for the benefit of the shareholders; but it is impossible that they could fairly and properly exercise it if they were compelled to give the reason why they rejected a particular individual. Take the most ordinary reason why they are entitled to reject him, viz., that they believe him to be in a state of insolvency or that they could not discover what his pecuniary position was. Are they to state that as their reason for doing so? Is it to be said that they are bound to admit anybody as a shareholder, whatever doubts they may have as to whether he is insolvent or not, or whether he is pecuniarily able or not to pay the calls? Are they to be prevented from rejecting a person on that ground unless they openly say so and inform him that that is the ground upon which they reject him? It is perfectly obvious that directors would never like to exercise their power if they were liable to be called upon to exercise it under those conditions, because, of course, the shareholder would immediately challenge their decision, he would make an application to a Court of Equity to have the matter tried, and they would at once be involved in a considerable litigation. Or they might be reluctant to run the risk of publishing their opinion as to the solvency of a person for fear of bringing on his bankruptcy, whereas if nothing was said he might be able to get through his difficulties in a perfectly solvent condition. So also if the objection involved something

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(1) L. R. 8 Ch. 446.

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(1) L. R. 8 Ch. 449.

(2) *Sic* as reported.

(1) L. R. 8 Ch. 451.

against the man's character, if they were to be obliged to tell it, of course the matter would be instantly challenged. Actions might be brought, and the directors might be examined and cross-examined as to what the grounds for their imputation were. I am, therefore, of opinion that in order to preserve to the company the right which is given by the articles a shareholder is not to be put upon the register if the board of directors do not assent to him, and it is absolutely necessary that they should not be bound to give their reasons." That is, if business men, members of a company, contract that no new shareholder shall be admitted unless approved by the body to whom the sole right of approval is committed by the members, although this may interfere with some of the proprietary rights which would otherwise be vested in the members as such and involve a consideration of the character and position of the proposed transferee, the exercise by the body so chosen of the discretion so given, and their right to determine the method of procedure by which they think right to arrive at it, is absolute and intended by the shareholders as evidenced by their contract to be so; and, in the absence of wrong-doing alleged and proved, will not be controlled or interfered with by the Court. See also *In re Coalport China Co.* (1)

In answer to this the plaintiff's counsel rely upon the well-known rule that if in the absence of such a contract as is proved in this case a tribunal is selected either by parties or by Parliament to deal with and adjudicate upon an existing and defined dispute inter partes, or to exercise a punitive jurisdiction on an alleged charge of misconduct whereby a man may be deprived of his property, the tribunal so set up must act in accordance with the ordinary rules of justice and fair-play and fairly listen to both sides. See *Board of Education* v. *Rice* (2), *Local Government Board* v. *Arlidge* (3), *Fisher* v. *Keane* (4), *Labouchere* v. *Earl of Wharncliffe* (5), *Rigby* v. *Connol* (6), and *Russell* v. *Russell* (7), cases which were cited in the argument. In the last-mentioned case Jessel M.R., referring to *Wood* v. *Woad* (8), said: " I must say it contains a very valuable statement

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(1) [1895] 2 Ch. 404.
(2) [1911] A. C. 179.
(3) [1915] A. C. 120, 132.
(4) 11 Ch. D. 353.
(5) 13 Ch. D. 346.
(6) 14 Ch. D. 482.
(7) 14 Ch. D. 471, 478.
(8) (1874) L. R. 9 Ex. 190, 196.

ASTBURY J. by the Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial functions to perform. . . . . The passage I mean is this, referring to a committee: 'They are bound in the exercise of their functions by the rule expressed in the maxim audi alteram partem, that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals.' . . . . *Wood* v. *Woad* (1) was in effect this: there was a rule which allowed a committee of a mutual insurance society to expel a member, and the ground was, 'that if the committee shall at any time deem the conduct of any member suspicious, or that such member is for any other reason unworthy of remaining in this society, they shall have full power to exclude such member.' Consequently by excluding him the committee declare to the world, to all his neighbours and friends, and to all the other members of the society in particular, that they 'deem' his conduct suspicious, and for some reason that he is unworthy to remain in the society. By the very act of excluding him they cast a stigma upon him." The learned judge then goes on to deal with the meaning of the word "deem" and says that "one of its meanings is to adjudge or decide."

The cases relating to the procedure of a private or non-judicial tribunal selected to deal with an existing issue inter partes have in my judgment no real bearing upon what I have to decide, and the authorities on the expulsion of members from clubs and other societies for misconduct are not in point, unless such decisions as *Ex parte Penney* (2) and *In re Coalport China Co.* (3) are in conflict with them, which, in my opinion, is not the case. The validity of the expulsion of a member of a society for misconduct whereby he is deprived of property vested in him as a member, as, for instance, under rule 16 of the Stock Exchange Rules, depends upon the observance by the body to whom the power of expulsion is confided of recognized rules of procedure in the absence of contractual provisions to the contrary, and requires, except in exceptional cases, that the accused shall be informed of the character of the charge to be investigated and that he and his witnesses, if any, shall be heard in his defence. Further, and this applies to both of the last-mentioned categories of authority, wherever power is confided to a tribunal as such, the " discretion " that the tribunal may exercise involves that it shall be exercised according to the rules of reason and justice, not according to private opinion ; according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit to which an honest man, competent to the discharge of his office, ought to confine himself. See per Lord Halsbury in *Sharp* v. *Wakefield*. (1)

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(1) L. R. 9 Ex. 190, 196.

(2) L. R. 8 Ch. 446.

(3) [1895] 2 Ch. 404.

In the present case the plaintiff's sole complaint is really, not that he has been expelled from membership, as in the club cases, but that the committee refused his application for re-election. He has neither alleged nor proved that the committee wrongfully held him guilty of any offence, nor that any specific charge was made or decided against him, nor that the committee acted from any improper motive, nor that their decision was not come to and their procedure selected in the circumstances within the limits of honesty, reason, and justice. The contract by which the plaintiff is bound gave to the committee the duty of re-electing him if they deemed him eligible, whether any charge was made against him or not. They have not done so, and there is no evidence before me that entitles me to question their decision or to hold that they adopted any wrong or unfair method of arriving at it under circumstances which they knew and I do not.

I am of opinion that the contract gave to the committee the right to decide how and by what procedure they would carry out the fiduciary duty committed to them, whether an objection under rule 35 had been lodged or not, and, in the absence of evidence to the contrary, I cannot say that they departed in any way from what the law requires of them in this respect, but must assume that they, acting honestly, came to the conclusion for some good and sufficient reason connected with the true interests of the Stock Exchange that the plaintiff was not eligible for re-election ; and, in my judgment, it is of the first importance that their right to do so

(1) [1891] A. C. 173, 179.

under the rules should be preserved to their cestuis que trust as a whole.

In what I have said I have assumed that the plaintiff had at the time when the committee dealt with his application, and still has, a sufficient proprietary interest to entitle him to seek the protection of a Court of law; but under the constitution of the Stock Exchange there is much to be said to the contrary. The plaintiff's proprietorship, as it existed when he sent in his application for re-election, has not been interfered with, but if he fails to secure re-election a second time—that is, in March, 1917—he will have to part with his shareholding as a proprietor and will then receive the then value of his shares, the holding of which in itself gives him no right to membership.

Having regard, however, to the view I take of the contract contained in the deed of settlement and the rules and of the authorities which in my judgment apply, it is unnecessary for me to decide this point, both parties being desirous that the case should be decided on its merits.

For the reasons that I have endeavoured to explain the plaintiff's case fails and must be dismissed with costs.

Solicitors: *Michael Abrahams, Sons & Co.; Travers-Smith, Braithwaite & Co.*

G. R. A.

Approved. Basma v. Weekes [1950] A. C. 441

LOVESY *v.* PALMER.

[1916 L. 330.]

YOUNGER J.

1916

April 6, 7, 8, 11, 12.

Vendor and Purchaser—Contract—Specific Performance—Lease—Name of proposed Lessee—Contract by Agent—Agent not liable as one of Contracting Parties—Right of Principal to sue—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

Where a contract to which s. 4 of the Statute of Frauds applies has been made by an agent in such terms that the agent is not himself liable as one of the contracting parties, the principal can sue on it only if his name appears in the memorandum of the contract or his identity from the description of him therein appearing cannot fairly be disputed.

Rossiter v. *Miller* (1878) 3 App. Cas. 1124 and *Jarrett* v. *Hunter* (1886) 34 Ch. D. 182 followed.

Filby v. *Hounsell* [1896] 2 Ch. 737 discussed.

WITNESS ACTION.

This was an action by Charles Warren Lovesy against George Palmer and Harold Fitch Kemp claiming by their writ a declaration that there was a binding contract between the defendants and the plaintiff to grant to a company then being formed by the plaintiff a lease of the Coronet Theatre, Notting Hill Gate, in the county of London, in the terms of certain agreed heads of lease and draft lease, and for specific performance of the said contract.

The defendants were trustees for the debenture-holders of Saunders Theatres, Limited, and as such held a lease of the theatre which they were desirous of selling or leasing.

A preliminary interview with reference to a grant of a lease by the defendants took place between W. H. Chantrey (the defendants' receiver), the plaintiff, and Hugh V. Harraway, the plaintiff's solicitor. This was followed by interviews between the defendants and Harraway, who had full authority to act on behalf of the plaintiff. At an interview on November 29, 1915, the matter was fully discussed and terms of a proposed lease agreed in outline, and the defendants then handed the matter over to their solicitors, Messrs. Oldfields.

Messrs. Oldfields then prepared and sent to Harraway a document headed "Memorandum of proposed heads of lease by the trustees for debenture-holders to Mr. Lovesy." Harraway returned these heads with various alterations, and amongst others he struck out the name of the plaintiff as lessee and substituted the word "company." A second edition of these heads passed between the solicitors, and then a third edition, and ultimately this third edition was agreed by correspondence with certain alterations. The heading of this third edition was "Coronet Theatre. Memorandum of proposed heads of lease by the trustees for debenture-holders," and the first clause was as follows :—"(1.) The lease to be granted to a company to be formed, the trustees to be satisfied that sufficient working capital will be available." A draft of the proposed lease was then prepared by the defendants' solicitors and passed backwards and forwards between them and Harraway and was ultimately agreed or approved. This draft lease was expressed to be made between the defendants of the one part and "   whose registered offices are at   (hereinafter called 'the lessee') of the other part."

Except in the first edition of the heads of lease as originally drawn and in the letter from Messrs. Oldfields to Harraway dated November 29, 1915, enclosing the same, the plaintiff's name was not mentioned in the correspondence between Oldfields and Harraway or in the heads of the proposed lease. The letters referred generally to Harraway's "clients" in the plural, though on some occasions the expression used was "client."

The defendants ultimately refused to grant a lease on various grounds, and this action was brought.

The plaintiff relied on, as constituting a concluded contract, the third edition of the heads of the proposed lease with the letters agreeing the same, and, alternatively, the draft lease and the letters referring thereto, and alleged that Harraway was the plaintiff's agent. The defendants in their defence denied that there ever was any concluded contract, and also relied on the Statute of Frauds. The plaintiff by his reply relied on, as additional memoranda under the Statute of Frauds, certain letters and documents which had passed between the defendants and their solicitors in which the plaintiff's name was mentioned.

Harraway had on February 26, 1916, registered a company called C. T., Limited, and the plaintiff put forward that company as the company to take the lease.

The evidence showed that Harraway was throughout the matter corresponding with various persons with a view to their taking up shares in the company when formed; but he and the plaintiff were both called as witnesses and stated that the plaintiff was throughout the transaction Harraway's only client. This evidence was objected to by the defendants, but was admitted de bene esse.

Clauson, K.C., and *Wilfrid M. Hunt*, for the plaintiff. It is submitted that there was a concluded contract on two occasions—(1.) when the third edition of the heads of the proposed lease was agreed and (2.) when the draft lease was agreed—and that these documents with the letters referring thereto are a sufficient memorandum within the Statute of Frauds. Harraway's name appears in the documents, and parol evidence is admissible to show who the principal was: *Filby* v. *Hounsell.* (1)

H. Terrell, K.C., and *Fairfax Luxmoore*, for the defendants. It is submitted that there never was at any time a concluded contract between the parties. It is clear on the correspondence that there was not a concluded contract on November 29, 1915, because negotiations continued after that date. Where on the correspondence you find a concluded agreement but the parties continue to negotiate, the agreement is treated as negotiation only, and there is no concluded contract: *Hussey* v. *Horne-Payne.* (2) The correspondence leaves it quite open who were the parties to the alleged contract. Nowhere in the correspondence, except in the letter of December 2, 1915, or in the documents relied on, is the plaintiff's name mentioned.

[*Clauson, K.C.*, referred to *Barkworth* v. *Young.* (3)]

Further, there is no contract or memorandum sufficient to satisfy the Statute of Frauds. To succeed the plaintiff must be able to point to a document signed by the defendants or their duly authorized agents, and there is no such document. This is not a case in which specific performance could be decreed. The Court could not require the plaintiff to form a company to take a lease of

(1) [1896] 2 Ch. 737.
(2) (1879) 4 App. Cas. 311.
(3) (1856) 4 Drew. 1.

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the theatre. The equitable jurisdiction of specific performance is limited to cases where there is mutuality: Fry on Specific Performance, 5th ed. p. 231.

[YOUNGER J. There need not be mutuality of remedy although no doubt there must be mutuality of obligation.]

In any event the plaintiff cannot obtain specific performance in this case. *Filby* v. *Hounsell* (1), on which the plaintiff relies as supporting his contention that parol evidence is admissible to prove that the plaintiff was Harraway's principal, is distinguishable. There the Court found as a fact that a contract had been entered into by Jolly as agent for an undisclosed principal. What was there dealt with was the offer. From that point of view it was a case of an undisclosed principal. The only question which had there to be considered was the offer. The acceptance might have been verbal.

[YOUNGER J. Mr. Beddall in that case seems to distinguish *Williams* v. *Jordan* (2) on a ground which is fatal to him.]

Morris v. *Wilson* (3), which is there referred to, was a clear case of an undisclosed principal. In Halsbury's Laws of England, vol. vii. p. 371, *Filby* v. *Hounsell* (1) is cited for the proposition that "It is sufficient if the memorandum contains the names of both of the parties entering into the contract, though one of them may be an agent for an undisclosed principal." See also vol. xxvii. pp. 25, 29. The case is also dealt with in Fry on Specific Performance, 5th ed. p. 171; Williams on Vendor and Purchaser, 2nd ed. pp. 1085, 1087. In *Clark* v. *Robinson* (4) the case was referred to, but not on the present point.

The term "client" is not a sufficient description of a contracting party: *Jarrett* v. *Hunter* (5); *Rossiter* v. *Miller*. (6) The evidence of Harraway is not admissible to prove who his clients were: *Potter* v. *Duffield* (7); *Jarrett* v. *Hunter*. (5) It would only be admissible if the contract were one under which he was personally liable, and it is clear upon the correspondence that the contract was to be made with Harraway as an agent, and that Harraway was never intended to be under any personal liability as contractor. The fact that he purported to act on behalf of a client is not sufficient to make his evidence admissible: *Rossiter* v. *Miller*. (1)

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(1) [1896] 2 Ch. 737.

(2) (1877) 6 Ch. D. 517.

(3) (1859) 5 Jur. (N.S.) 168.

(4) (1903) 51 W. R. 443.

(5) 34 Ch. D. 182, 184.

(6) 3 App. Cas. 1124, 1141.

(7) (1874) L. R. 18 Eq. 4.

Clauson, K.C., in reply. Where a person signs a contract in his own name without qualification, he is prima facie to be deemed to be a person contracting personally, and in order to prevent this liability from attaching it must be apparent from the other portions of the document that he did not intend to bind himself as principal: *Hough & Co.* v. *Manzanos & Co.* (2)

It is submitted that you must take the memorandum and find out whether the person in question is an agent or not. Assuming that he is an agent, you have then to ascertain whether there is anything within the four corners of the contract which, as no principal is named, relieves him from his prima facie liability. In the case of an ordinary sale of land or the taking of a lease it would of course be absurd to suppose that the agent intended to purchase the land or acquire the lease for himself. In the present case the contract was made with Harraway, and it is submitted that he is personally liable under it notwithstanding the fact that he entered into it on behalf of other persons. There is nothing, therefore, to prevent the plaintiff from suing upon it provided that he can satisfy the Court that he was Harraway's principal. In *Calder* v. *Dobell* (3) it was held that parol evidence of the circumstances under which the contract in that case was made was admissible. The defendants can only succeed if they can show on the correspondence that Harraway was not intended to be personally liable on the contract.

YOUNGER J. stated the nature of the action and continued: The action raises many very nice questions and a point of law which in the present state of the authorities is not an easy one to determine, and if it were not for the urgency of the case I should have liked to take time to consider my judgment. In the interests, however, of both parties it is better I should express at once the conclusion I have formed on the whole case, even although I may not succeed in giving my reasons with all the precision I should desire.

The case is peculiar in this respect, that with the exception of two

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(1) 3 App. Cas. 1124, 1141. (2) (1879) 4 Ex. D. 104, 106.
(3) (1871) L. R. 6 C. P. 486.

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trivial matters on which the defendants rely, and, as I think, unsuccessfully, for the purpose of showing that there was no concluded bargain, the arrangements for the proposed lease which is referred to in the passage from the writ I have just read were adjusted to the last detail. [His Lordship then dealt with the matters referred to which are not material for the purposes of this report, and continued:] But a much more serious question remains for decision. It is that on which the greater part of the argument has turned: Is there here an agreement at all? If so, who are the parties to it? Is there any contract with the plaintiff? Has there ever been any contract with the plaintiff? Has the Statute of Frauds been complied with in relation to any such contract, if contract there be? [His Lordship then referred in detail to the correspondence, the heads of the proposed lease, the draft lease, and the pleadings, and continued:] Now in these letters which are set forth as constituting the memorandum of agreement the plaintiff's name does not occur in any one of them. Not only so, but in these letters Harraway speaks of the persons on whose behalf he is acting as his "clients" and not as his "client." And in the letter of January 7, 1916, which is one of those referred to, Harraway says: "In order to make the matter clear, however, I would point out to you that my clients do not regard the building of the cinematograph box or alterations to the existing one, as the case may be, as a condition for obtaining the licence, but they regard this as an expense they were obliged to make in any event which does not come within the operation of the note." Therefore in the memorandum relied upon not only is there no reference to the plaintiff as a contracting party, but the only reference there is to anybody other than the defendants and Harraway is to persons in the plural, who are described as "clients" of Harraway, and not a person in the singular, "a client."

In the reply, however, further particulars of the memorandum relied upon are given. It is alleged in paragraph 2 that "In addition to the documents referred to in paragraph 3 of the statement of claim as constituting memoranda"—and then the pleader says—"of the verbal agreements therein referred to the plaintiff also relies upon as constituting memoranda of such agreements the following documents disclosed by the defendants in their affidavit of documents herein (namely) the letters of the 29th November, 1st December, and 2nd December, 1915 (two letters of each date), and the document or documents in such letters respectively referred to being memoranda or heads of agreement and also the minute of the meeting of the defendants of the 13th December, 1915, and the heads of agreement therein referred to." Now if reference be made to these letters I am right I think in saying that it is only in the letter of December 1, 1915, that the name of Lovesy, the plaintiff, appears, and it is important to notice the connection in which his name does there appear. The defendant Palmer, writing to Oldfields, says: "I enclose copy heads of agreement for proposed lease of Coronet Theatre to Mr. Lovesy, who intends, I think, to form a small company to operate a cinematograph entertainment," and enclosed there are heads of agreement which suggest, or if you like, require, that the intended lessee shall be, not the company which was to be the intended lessee under the memorandum as finally adjusted, but the plaintiff himself. So that the only relation in which the plaintiff's name appears in connection with the transaction is in that of lessee, a position which, according to the contract alleged, he was not to occupy, inasmuch as the lease was to be taken by the company to which I have referred at the commencement of this judgment, and not by the plaintiff at all. In the result, therefore, there is no reference, either expressly or by necessary implication, to the plaintiff in the whole of the documents referred to as constituting the memoranda except in a character in which, according to the terms of the bargain as now alleged, he was not to figure.

Now in that state of things I have to see whether there is a memorandum sufficient to satisfy the Statute of Frauds. For this purpose I take the law from the statement of it in Sir George Jessel's judgment in *Potter* v. *Duffield* (1), where, quoting from the judgment of Sir John Taylor Coleridge in the case of *Williams* v. *Byrnes* (2), he says: "'The words'"—that is to say, the words of the statute—"'require a written note of a bargain or contract, the statute clearly making no distinction between these two words. This language cannot be satisfied unless the existence of a bargain or contract appear evidenced in writing; and a bargain or contract

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(1) L. R. 18 Eq. 4, 7.

(2) (1863) 9 Jur. (N.S.) 363, 364.

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cannot so appear unless the parties to it are specified, either nominally or by description or reference' "; and he adds: "I take that to mean that the statute will be satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed."

Now, looking at this case from the point of view on which up to the present I am regarding it, there is here no memorandum signed by the defendants or their agents which contains either in itself or by reference to any other document the name of the plaintiff as a contracting party, or any reference to any person who without dispute could be identified as necessarily being and meaning the plaintiff. Even if in the letter of January 7, 1916, or in any other letter, the word used by Harraway had been "client" instead of as it is, "clients," that would not have been a sufficient description of the plaintiff. So much, I think, is clear from the case of *Jarrett* v. *Hunter*. (1) It is, I think, equally clear that, even if it be the fact—and I do not think it is the fact—that the defendants knew who the client was, or knew that the clients were in fact the plaintiff Lovesy, however inappropriate that description might be, the result would have been the same, because *Jarrett* v. *Hunter* (1) is also a clear authority for the proposition that the memorandum, being only made sufficient by means of oral evidence to show knowledge on the part of the other side, is not a memorandum in writing within the statute. And inadmissible as such evidence must for such a purpose always be, more clearly inadmissible is it where its effect, as here, is not to supplement but to contradict the statement in the written memorandum that the clients for whom Harraway purported to act were "clients" and to show that the so-called clients were one client only.

Under these circumstances I think Mr. Terrell was right when he suggested at the beginning of the case that evidence as to the identity of the plaintiff was not admissible. I only admitted it de bene esse in order to avoid a difficulty in the event of the case going to the Court of Appeal. But I think it right to say, now that the evidence has been taken, that if it were admissible I should not myself conclude that the word "clients," which throughout the correspondence and on the draft lease is so frequently used by

(1) 34 Ch. D. 182.

Harraway, ever meant, or ever was intended by him to mean, the plaintiff. The word "clients" so constantly used may have referred to a group of persons who were ultimately to come in and find the capital for the company which was to take the theatre. The word I think may have referred, and probably did frequently refer, to them. Often, however, the word "clients" referred to the future company itself, and especially do you find this in the marginal notes which Harraway made on the draft lease before final adjustment, where he speaks of the obligations of the lessees as being the obligations of his clients. I think, therefore, in truth that the word "clients" as used throughout the correspondence was either used to mean a group of persons of whom the plaintiff was one or to signify the company to be formed to take over the theatre. But I cannot find that by the word Harraway ever meant to refer to the plaintiff alone. And indeed, so far as I can arrive at the true position of the plaintiff in this matter, I doubt if he was more than an intermediary with a genius for organizing cinematograph undertakings, whose right was to obtain a fee from those who ultimately secured as a result of his assistance a lease of this theatre adapted for cinematograph purposes. Therefore, if the contract was a contract which was made by Harraway on behalf of the plaintiff, the action fails because there is no memorandum of it sufficient to satisfy the Statute of Frauds. The action, however, I think, also fails on the ground that there is no evidence to show that the plaintiff was in truth the principal of Harraway in the transaction. But I may be wrong on this last conclusion of fact, and accordingly I proceed to deal with the other questions argued on the footing that I am.

It was said by Mr. Clauson, more particularly in his reply, that here in fact there was a contract with Harraway personally sufficiently evidenced under the statute, and not the less so because it was made, and one might even go so far as to say avowedly made, by Harraway on behalf of some one else; and Mr. Clauson contended that there was nothing to prevent the plaintiff from coming forward and suing upon that contract, provided that he established, as it was said he had done, that he was the principal of Harraway in relation to it. Further, Mr. Clauson in his reply went so far as to suggest that Harraway was personally liable on the contract, and his final contentions were mainly directed to this aspect of the case. The earlier arguments, however, proceeded on the footing that it made no difference whether Harraway was or was not personally liable under the contract, and great reliance was placed on the case before Romer J. of *Filby* v. *Hounsell* (1), to which I shall have to refer. But before I deal with that case I wish to say that I do not find in the statement of claim any sufficient allegation that it was ever intended either by Harraway himself or by the defendants that there should be imposed on Harraway, who throughout was known to be acting as solicitor for clients, any personal liability in relation to this matter, and I take the law on the subject to be that if the true construction of the documents in the case be that the agent contracts only on behalf of an undisclosed or unnamed principal, and not on his own account, then he, the agent, can neither sue nor be sued on the agreement: *Southwell* v. *Bowditch* (2); *Gadd* v. *Houghton.* (3) My view is that on the true construction of the whole correspondence here Harraway contracted only on behalf of unnamed principals or clients and never on his own behalf, and I am of opinion as the result of the whole correspondence and of all the evidence which has been given that on such an agreement, if any agreement there was, he could at no time have sued or been sued.

The only question, therefore, that remains is whether *Filby* v. *Hounsell* (1) and the decision of Romer J. there would enable Lovesy, unnamed as he was, if he were in fact the principal, to sue on the contract even although Harraway had never himself been liable upon it.

Now I have read and re-read that case, and I have the greatest difficulty in understanding exactly what was the ground on which Romer J., as reported, rested his decision. Taking the case as reported, I cannot find that there was any moment of time at which the agent there was personally liable for anything. There was no acceptance of the offer which was addressed to him except on behalf of his principal. The only acceptance which constituted any contract was an acceptance upon which the principal alone could be sued. If the agent had accepted the contract in his own name,

(1) [1896] 2 Ch. 737.
(2) (1876) 1 C. P. D. 374.
(3) (1876) 1 Ex. D. 357.

true it is that the principal, when disclosed or discovered, could, according to all the authorities, both sue and be sued upon it. But the agent never did accept the contract for himself; he accepted it only on behalf of the principal, and therefore there was no moment of time at which that agent was, as far as I can see, responsible for any contract whatever as his own.

Now, if in *Filby* v. *Hounsell* (1) the only contract was a contract made with the principal, then, as the principal's name appeared only in a document which was subsequent in point of date to the paper relied upon as constituting the memorandum under the statute, this would not satisfy the statute, for I find in the case of *Williams* v. *Jordan* (2) that the reference to the name if not in the memorandum itself must be found in a document antecedent to the memorandum. Sir George Jessel there says (3): "In the case of *Warner* v. *Willington* (4), just as in this case, the lessor's name was not signed, and Vice-Chancellor Kindersley held that because the name of the lessor did not appear the memorandum was not sufficient to maintain an action or bill for specific performance. He said: 'But though this is the general rule, there is this exception, that if it can be ascertained who is the vendor or intended lessor from some other document which is sufficiently connected with the memorandum by clear reference'" —and then Sir George Jessel interpolates the words "of course he meant some other document previously existing"—"'that will cure the defect of the memorandum.'"

Accordingly, as in the case before Romer J. the only reference to Mrs. Filby was in a document subsequent to the memorandum relied upon, I fail to see how at any moment of time there was any memorandum within the statute of an agreement binding her. And I have looked for, but I have been unable to find, any other case where it has even been suggested that an unnamed principal can sue or be sued on a contract to which the statute applies where he is not himself sufficiently described in the memorandum, except in a case where by the memorandum the agent is himself liable on the contract. And I should not expect to find any such authority, because it appears clear that, unless the agent is liable on the

(1) [1896] 2 Ch. 737.

(2) 6 Ch. D. 517.

(3) 6 Ch. D. 520.

(4) (1856) 3 Drew. 523, 530

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contract, you can on the hypothesis have no memorandum of any *agreement* at all. And the case cited in the argument of *Filby* v. *Hounsell* (1), namely, *Morris* v. *Wilson* (2), as justifying the view there contended for and ultimately adopted is to my mind quite consistent with what I have said, because I think it may very well have been that Wood V.-C. was there of opinion that the agent had made himself personally liable.

Further, if it was in fact decided in *Filby* v. *Hounsell* (1) that there could within the statute be a sufficient memorandum of an agreement where the principal was not named and the agent was not bound, then I do not think that the decision can stand with the other authorities, such as *Rossiter* v. *Miller* (3) and *Jarrett* v. *Hunter* (4), or with the statute as I read it.

But I think, when one looks carefully at the case of *Filby* v. *Hounsell* (1), that Romer J. really gave the judgment he did because he assumed that the agent was liable on the contract. I cannot myself see for reasons I have given that the assumption was well founded, but if that was the basis of the learned judge's decision, then the case presents no further difficulty and is in entire harmony with all the authorities. If, however, he proceeded on that hypothesis, then *Filby* v. *Hounsell* (1) has, in the view I take of this case, no bearing here; and if *Filby* v. *Hounsell* (1) is to be dealt with upon the other hypothesis, namely, that the learned judge did not think it necessary that the agent should be bound, then I think it is not in accordance with *Rossiter* v. *Miller* (3) or with principle. On either view the case of *Filby* v. *Hounsell* (1) cannot be allowed to affect the result of the present action.

Under these circumstances the action appears to me to fail.

[His Lordship then dealt with the question of costs and held that there was no ground for departing from the ordinary rule that the costs should follow the event. He accordingly dismissed the action with costs.]

Solicitors: *H. V. Harraway*; *Oldfields*.

(1) [1896] 2 Ch. 737.
(2) 5 Jur. (N.S.) 168.
(3) 3 App. Cas. 1124.
(4) 34 Ch. D. 182.

W. I. C.

SEBRIGHT *v.* HANBURY.

[1915 S. 1778.]

YOUNGER J.
1916
May 15.

Practice—Agent—Undisclosed Principal—Action against Agent alone—Amendment—Interrogatories—Name of alleged Principal—Relevancy—Rules of the Supreme Court, Order XXVIII., *r.* 12; *Order* XXXI., *r.* 1.

In an action by the vendor against the purchaser for specific performance of a contract of sale, the plaintiff is not entitled to interrogate the defendant for the purpose of discovering whether he was acting as agent for an undisclosed principal.

Leave to amend and to deliver interrogatories with this object refused.

ADJOURNED SUMMONS.

By an agreement dated December 23, 1913, the plaintiff, as tenant for life under a settlement, agreed to sell and the defendant agreed to buy two pictures at the price of 16,000*l.*, subject to an order of the Court sanctioning the agreement under s. 37 of the Settled Land Act, 1882, the defendant paying a deposit of 1600*l.* The plaintiff now brought this action for specific performance of the agreement, alleging by his statement of claim that on October 19, 1914, the necessary order of the Court had been obtained and notice thereof given to the defendant on January 16, 1915, who, however, refused to complete, and claiming (1.) specific performance and payment by the defendant of the balance of the purchase-money, and (2.) damages.

The defendant by his defence pleaded that the plaintiff by his laches and delay in obtaining the order of the Court had debarred himself from obtaining specific performance, and by paragraph 10 pleaded that, having regard to the outbreak of the war before such order of the Court was obtained, an order for specific performance would impose great hardship on the defendant, and that it would be inequitable to enforce the agreement on the defendant.

The plaintiff, having some reason to believe that the defendant was acting as agent for an undisclosed principal, on February 3, 1916, took out this summons for leave to amend and for leave to deliver interrogatories.

The proposed amendment was as follows: " The plaintiff believes and charges as a fact that when the defendant entered into the said contract for purchase he was acting wholly or partially as agent for some other person or some persons, firm or company, or else he at some time gave an option to some other person or some persons, firm or company, to purchase the said pictures or some share therein and such option was exercised. In fact at the present time the defendant is in some way entitled to the benefit of the said contract or part thereof only as agent or as a trustee. The plaintiff cannot at present give better particulars on this subject and it is right that the defendant should answer interrogatories thereon and disclose particulars as to the interests of all other persons and all firms and companies in the said pictures."

The proposed interrogatories were as follows :—

1. " When you entered into the contract of December 23, 1913, mentioned in the pleadings, were you acting to any extent as agent for any other person or persons or firm or company ? If so, state particulars."

2. " When you entered into the said contract had any person, persons, firm or company, any right or option to purchase or acquire the whole, or any share in the pictures to which the same referred, from you, if you acquired a right to them ? If so, state particulars as to who had such right or option and how it was acquired."

3. " When you entered into the said contract were you alone directly or indirectly interested in the subject-matter thereof ? If not, state particulars as to any person, persons, firm or company so interested, and the nature of his or their interest and how it was acquired."

4. " When you entered into the said contract were you free to keep the full benefit thereof and alone liable to pay the purchase-money, and whether or not on a resale would you alone have been entitled to the purchase-money ? If not, state particulars showing who were interested to the contrary and how."

E. Beaumont, for the plaintiff. Interrogatories are legitimate in order to discover the names of persons in order to make them parties to the action, and the proposed amendment should be allowed on which to base the interrogatories : Order XXVIII., r. 12 ; Order XXXI., rr. 1, 7 ; Annual Practice, p. 518 ; Bray on Discovery, pp. 19, 20. It is objected that to allow the proposed amendment would be to allow the plaintiff to make an entirely new case, but no injustice can be done either to the present defendant or to the undisclosed principal whom it is proposed to add as a defendant.

Clauson, K.C., and *W. E. Vernon*, for the defendant. The proposed amendment and the interrogatories are equally irrelevant to the issue raised in the present action. There is no suggestion of agency on the pleadings, and the question whether the defendant has an undisclosed principal behind him can have no bearing on the issue raised by the pleadings. The plaintiff could no doubt sue the agent and alleged principal together, but his claim would be in the alternative, and he could only succeed against one or the other and not against both, and if he elected to take judgment against the principal he would necessarily fail against the agent. The only object of these interrogatories, therefore, is to establish a fresh cause of action against some other person, and pro tanto to destroy, not to support, the cause of action against the present defendant. Interrogatories as to the names of persons in order to make them parties to the action are legitimate only when the object is to complete and substantiate the proceedings against the defendant, as in a foreclosure action against a mortgagor in order to enable the mortgagee to add puisne incumbrancers—see *Union Bank of London* v. *Manby* (1)—or in an ejectment action in order to ascertain the names of the defendant's tenants: *Eyre* v. *Rodgers* (2); or in an action against a married woman in order to add the husband as a necessary party: *Hancocks* v. *Leblache.* (3) In *Thöl* v. *Leask* (4) interrogatories requiring the defendant to state whether he acted as principal or agent, and if as agent then to name his principal, were allowed, but the reason was that they supported the plaintiff's case, as explained by Martin B. in the course of the argument, where he says: "The plaintiff seeks to establish his own case. He alleges that the defendant falsely represented to him that he sold these goods as the agent of a third party, whereas in fact there was no such party. If that be so the plaintiff is entitled to recover back the money he has paid to the defendant under the count of money had and received." The interrogatories in the present case would have an exactly contrary effect by substituting another person for the present defendant. The rule is stated in Mitford on Pleading, 5th ed. p. 359, as follows: "He (the plaintiff) is also entitled to a discovery of matters necessary to substantiate the proceedings, and make them regular and effectual in a Court of Equity."

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(1) (1879) 13 Ch. D. 239.

(2) (1891) 40 W. R. 137.

(3) (1878) 3 C. P.D. 197, 202.

(4) (1855) 10 Ex. 704, 706.

E. Beaumont in reply. The authorities cited in no way conflict with the present application. The plaintiff is entitled to know the name of the undisclosed principal, if any, and to add him as a party. It does not, therefore, necessarily follow that the plaintiff will elect to proceed against the principal and abandon his case against the present defendant.

YOUNGER J. This is a case of some difficulty and also of some novelty by reason of the fact that the application, although one which might naturally be assumed to be to the advantage of the defendant, is strongly opposed by him. It becomes necessary therefore to decide whether the plaintiff is right on principle.

The action is one for the specific performance of a contract made between the plaintiff and the defendant under which the defendant purported to buy certain pictures subject to an order of the Court sanctioning the contract which has since been obtained. The defendant has not completed the contract and has made default in payment of the purchase-money. The statement of defence pleads laches and delay on the part of the plaintiff, and also that, having regard to the outbreak of the war before the order of the Court was obtained, an order for specific performance would impose great hardship on the defendant, and that it would be inequitable to enforce the agreement against the defendant.

In that state of things the plaintiff makes the present application asking for leave to amend the statement of claim by adding allegations to the effect that some other person was interested with the defendant in the contract, either as undisclosed principal or in some other way, and to deliver interrogatories on the subject. The proposed amendment is in the following terms: [His Lordship read it and continued:] And the plaintiff asks for leave to administer interrogatories so as to elicit the information of which, as appears from his proposed amendment, he is not at present possessed, but which by means of these interrogatories he hopes to obtain.

Now it is manifest that, if the amendment is made and the interrogatories are answered in the way which he expects, the plaintiff might sue as defendant another person whom he might compel to pay the full purchase price of the pictures. It is equally manifest that under ordinary circumstances a person in the position of the present defendant would be only too pleased to disclose the name of such other person so as to relieve himself of all liability. But in the present case the defendant is not desirous to do so, and there may be reasons for his refusal supposing any such person to exist.

The question, therefore, arises whether according to the practice of the Court the plaintiff is entitled, first, to amend his statement of claim, and, secondly, to administer these interrogatories for the purpose of obtaining the information he requires. It is clear that if the amendment were allowed and the action proceeded on the footing of the new facts suggested by the plaintiff the result would be that the plaintiff might be in a position to take judgment against one or other of two persons, but under no circumstances against both. The only object of the amendment and interrogatories, therefore, so far as this action is concerned, is to give the plaintiff the opportunity, if he is so minded, of releasing the present defendant from all liability under the contract but not to give him any kind of assistance in support of his claim against the defendant. The question, therefore, is whether an amendment ought to be made or interrogatories allowed the object of which is not to support the existing proceedings or to make them regular and effective against the present defendant, but to secure for the plaintiff some other person liable under the contract in substitution for and not jointly with the present defendant. I think it would be entirely contrary to the practice of the Court to accede to such an application. In my opinion interrogatories relating to the names of persons not already parties to the action are only allowable where the object is either to make the proceedings complete and effective for all purposes or to enable the plaintiff more effectively to substantiate the case which he makes against the existing defendant. That is clearly shown by two cases which have been cited in argument. The first is *Thöl* v. *Leask* (1), where in an action brought against a person who had purported to act as agent, but whom the plaintiff sued as principal, interrogatories were allowed, but with the object of charging the defendant with all the relief claimed by the plaintiff—in other words, with the object of enabling the plaintiff to succeed at the trial in the existing proceedings. So in *Hancocks* v. *Leblache* (2), which was an action against a married woman alone in respect of her separate estate, the Court, holding that her husband was a necessary party, gave leave to amend, and allowed an interrogatory for the purpose of discovering his name and address so that he might be made a defendant to the action and the proceedings might thereby be made complete. But neither case supports the proposition that the plaintiff is entitled to administer interrogatories where the object is not to enable the plaintiff more effectually to charge the defendant or to obtain complete relief in the existing action, but where the result would be in one, and the only relevant, event to discharge the defendant from all liability. Under these circumstances the present application strikes me as an interesting experiment; but I think it would be contrary to the practice of the Court, and contrary to the principles upon which amendment and interrogatories are allowed, to accede to it, and accordingly I make no order on the summons except that the defendant is to have his costs in any event.

Solicitors: *Tylee & Co.; Finnis, Downey, Linnell & Chessher.*

(1) 10 Ex. 704.

(2) 3 C. P. D. 197, 202.

A. C.

In re BURROUGHS-FOWLER.

THE TRUSTEE OF THE PROPERTY OF W. J. BURROUGHS-FOWLER (A BANKRUPT) *v.* BURROUGHS-FOWLER.

PETERSON J.
1916
May 4, 5.

[1915 B. 3566.]

Bankruptcy—Marriage Settlement—Protected Life Interest in Settlor's own Property—Determinable on Bankruptcy and other Events—Settlor adjudicated Bankrupt—Life Interest vesting in Trustee—Indefeasibility of Trustee's Title—Purchaser.

By an antenuptial settlement property of the husband was settled upon trust to pay the income thereof to him during his life, or until he should be outlawed or be declared bankrupt or become an insolvent debtor, or should do or suffer something whereby the income or some part thereof might if absolutely belonging to him become vested in or payable to some other person or persons, and from and after the death of the husband or other the determination of the trust for his benefit in his lifetime to pay the income unto the wife for life. The husband was adjudicated bankrupt in his wife's lifetime:—

Held, that upon the bankruptcy the husband's life interest vested indefeasibly in his trustee in bankruptcy and was no longer capable of being affected by any subsequent act of forfeiture by the husband, and that the trustee in bankruptcy could make a good title to the income of the settled property during the remainder of the husband's life.

ADJOURNED SUMMONS.

By an antenuptial settlement dated March 24, 1905, freeholds and leaseholds belonging to W. J. Fowler, the intended husband, were conveyed to the trustees upon trust to sell with the consents therein mentioned and "to pay the rents profits and income thereof to the said W. J. Fowler or to permit him to receive the same during his life or until he shall be outlawed or be declared bankrupt or become an insolvent debtor within the meaning of some Act of Parliament for the relief of insolvent debtors or shall do or suffer something whereby the said rents profits and income or some part thereof respectively might if absolutely belonging to him become vested in or payable to some other person or persons And from and immediately after the death of the said W. J. Fowler or other the determination of the trust for his benefit in his lifetime to pay the said rents profits and income unto the" wife if she should survive him during her life for her separate use without power of anticipation, and after the death of the survivor upon the usual trusts for the children of the marriage.

Some time after the solemnization of the marriage the husband took the name of Burroughs-Fowler.

On May 13, 1915, the husband was adjudicated bankrupt. The official receiver at Oxford was appointed trustee in the bankruptcy and offered for sale the husband's life interest under the settlement, but the intending purchaser objected that the debtor's life interest remained defeasible if the debtor should do or suffer any of the other specified acts of forfeiture.

The trustee took out this summons against the wife, the husband, and the trustees for the determination of the question to what estate, right, or interest in the income and capital of the trust funds and property he could make a good title in favour of a purchaser.

H. S. Preston, for the plaintiff. The provision for forfeiture on bankruptcy is void as an infringement of the bankruptcy law, and, a forfeiture having been incurred, the question is whether the trustee in bankruptcy takes an indefeasible interest, or takes only subject to and defeasibly upon the happening of any of the further conditional events. In *In re Brewer's Settlement* (1) this point was not argued or raised, but under a very similar trust it was held that on bankruptcy the life interest vested in the trustee for the residue of the life of the settlor, and that implies that it was not considered to be defeasible if any of the other events should subsequently happen.

Again, an alienation, whether voluntary, as in *Brooke* v. *Pearson* (2), or involuntary, as in *In re Detmold* (3), worked a forfeiture of a life interest which was held not to be affected by a subsequent bankruptcy, and in *In re Johnson* (4) it was held that the first bankruptcy had worked a forfeiture, and that, although the debts thereunder had been paid in full, the life estate did not vest in the trustee under a later bankruptcy. Those cases show that the trustee in bankruptcy takes an indefeasible interest, and that it is not now in the husband's power to do anything which will work a further forfeiture of the life interest, because that life interest has vested once and for all in the trustee. Either the whole life interest vests in the trustee indefeasibly or nothing vests in him, because if it is defeasible, then the day after the adjudication the bankrupt, by committing a further act of forfeiture, can divest the life interest from the trustee and render the bankruptcy law nugatory. I submit that the trustee takes indefeasibly. There is no satisfactory alternative.

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(1) [1896] 2 Ch. 503.
(2) (1859) 27 Beav. 181.
(3) (1889) 40 Ch. D. 585.
(4) [1904] 1 K. B. 134.

S. C. Leech, for the defendants. The trustee in bankruptcy cannot make an indefeasible title to the life interest during the remainder of the life of the bankrupt inasmuch as the trustee has not acquired an indefeasible interest himself. The settlement of the husband's interest on himself for life or until he becomes, for instance, outlawed is perfectly good and on his outlawry the trust in favour of his wife would come into operation, and I submit that there is no reason why the wife should be deprived of an interest which has been given to her for valuable consideration merely because the husband has become bankrupt before suffering outlawry or any other act of forfeiture. If bankruptcy is the first to happen, the trustee becomes entitled, but only subject to the other trusts of the settlement, and what has vested in him passes to the wife on the happening of any other of the events of forfeiture. In *In re Goldney* (1) Sir George Rose was of opinion that the husband's interest went to the assignee although the very next minute it might go away from him by reason of the bankrupt committing one of the acts of forfeiture to which the interest was made subject. The trustee is claiming this interest under the settlement, and cannot sell a greater interest than the bankrupt himself had.

H. S. Preston in reply.

PETERSON J. In this case I am required to solve a puzzle which arises out of a clause relating to a protected life interest under a marriage settlement dated March 24, 1905. Under that settlement W. J. Fowler (who afterwards took the name of Burroughs-Fowler), on the occasion of his marriage with his then intended wife, settled certain property belonging to him. The property was conveyed to the trustees in trust for conversion and investment of the proceeds, and the trust premises were to be held by the trustees upon the following trusts: [His Lordship read the trusts above set out and continued:] The marriage took place a few days after the execution of the settlement, and on May 13, 1915, the husband was adjudicated bankrupt. The trustee in bankruptcy has entered into negotiations for the sale of the bankrupt's interest under the settlement, and the question which has arisen is what is the interest which has vested in the trustee and of which the trustee is now able to dispose.

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(1) (1839) Mont. & C. 75, 89.

Now the limitation until the settlor is declared bankrupt is void as against the trustee in bankruptcy, and therefore, so far as the trustee in bankruptcy is concerned, the words relating to the bankruptcy and insolvency of the settlor must be treated as if they were omitted altogether from the clause. But on the other hand the provision as to bankruptcy and insolvency is not void as between the husband and the wife; for it was decided in *In re Johnson* (1) that, while the provision for the cessation of the life interest on bankruptcy was void as against the trustee in bankruptcy, it was effective for the purpose of producing a forfeiture as between the person who had the protected life interest and the persons interested in remainder. What, then, is the result? It is said that the result may be that the trustee in bankruptcy will be in a position to dispose of more than was vested in the bankrupt himself. That would be so in any case, because, so far as the trustee is concerned, the provisions for terminating the protected life interest upon bankruptcy are void. It seems to me that the true view is that, so far as the trustee in bankruptcy is concerned, the provisions as to bankruptcy and insolvency must be treated as excluded from the settlement, and the trustee is therefore in a position to deal with the interest of the husband under the settlement, whatever it may be, as if those provisions were excluded. So far, however, as the wife is concerned the forfeiture by reason of the bankruptcy has already taken place, and, therefore, it is no longer possible for the husband hereafter to do or suffer something which would determine his interest. The result is that the trustee in bankruptcy is in possession of the life interest of the bankrupt, which is now incapable of being affected by any subsequent forfeiture.

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(1) [1904] 1 K. B. 134.

Solicitors: *Taylor, Willcocks & Co., for Smith & Burrell, Richmond.*

R. M.

PHELPS v. MAYOR, COMMONALTY, AND CITIZENS OF THE CITY OF LONDON.

[1914 P. 1612.]

PETERSON J.
1916
March 20, 21; *April* 4, 5, 6, 10.

Landlord and Tenant—Demise of Business Premises—Exception of existing Way or Passage and Basement underneath—Absolute Ownership—Style of Decoration—Common Intention—Demolition by Landlord—User as Cartway—No implied Obligation to maintain and use in original Condition—Trespass—Quiet Enjoyment—Temporary Annoyance.

The defendants demised to the plaintiff a block of freehold business premises in Aldermanbury, in the city of London, excepting out of the demise "the way or passage and basement under the same" shown on the plan and leading from Aldermanbury through the ground floor and underneath the first floor of the demised building to property of the defendants in rear of the block. The passage was entered from Aldermanbury through double doors, the floor was of concrete carried on iron girders and covered with mosaic and "Terrazzo," the walls were faced with glazed bricks, and there was a fireproof division between the passage and the first floor above it. Seventeen years after the grant of the lease the defendants proceeded to demolish the floor of the passage and remove the "tie" girders in order to make a timber cartway from the entrance in Aldermanbury down to the level of the basement in the rear of the building for the purpose of carting building materials and debris to and from the Guildhall across their property in rear of the demised premises. In an action by the plaintiff to restrain these proceedings and the resultant nuisance from noise:—

Held: (1.) on the construction of the lease, that the property in half the north wall and in the floor of the passage had been reserved to the defendants, and that they had not committed a trespass in removing the floor of the passage and the girders from the north wall.

(2.) that the defendants could use the passage for any purpose allowed by law not injuriously affecting the rest of the building, and that there was no implied obligation upon them to keep and use the passage and basement in the condition in which they were at the date of the lease.

Reilly v. *Booth* (1890) 44 Ch. D. 12 applied.

Lyttelton Times Co. v. *Warners* [1907] A. C. 476 and observations of Lord Parker in *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634, 646, 647, explained.

(3.) that the stability of the north wall had not been affected by the acts of the defendants; and

(4.) that there had been no breach of the defendants' covenant for quiet enjoyment, and that the annoyance, being temporary, did not constitute a cause of action.

Jenkins v. *Jackson* (1888) 40 Ch. D. 71, *Harrison* v. *Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409, and *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* [1898] 2 Ch. 394, 401, applied.

WITNESS ACTION.

In the year 1895 the defendants were the owners of a building site lying on the east side of Aldermanbury and to the west of the Guildhall, from which it was separated by a small piece of vacant land which also belonged to the defendants. Under a building agreement made in that year the plaintiff erected upon the site two buildings now known, the one as Nos. 15 and 16, Aldermanbury, and the other as No. 17, Aldermanbury, and separated from each other by a wall dividing the north side of No. 16 from the south side of No. 17. This north wall ran up the whole of the north side of No. 16, which was four storeys high, and also ran up the whole of the south side of No. 17, which was a lower building. Immediately south of this wall was a passage leading from Aldermanbury to the rear or east side of the building, having on its south side a wall running from the basement level to the under side of the first floor. This south wall and the north wall already mentioned formed the sides of the passage. On the east side of the building the passage was continued by a bridge communicating with the Guildhall.

Upon the completion of the buildings, the defendants on October 28, 1897, in pursuance of the building agreement granted a long lease of Nos. 15 and 16 to the plaintiff with certain reservations in respect of the passage in question, and the true effect of these reservations constituted one of the chief points of dispute in this action. By the lease the defendants demised "All that piece or parcel of ground together with the messuages or tenements thereupon erected situate and being Nos. 15 and 16 on the east side of

Aldermanbury in the city of London containing" certain measurements not material to be set out, and the piece of ground was stated to be coloured pink on the plan, "together with all appurtenances to the said premises belonging save and except out of this demise the way or passage and basement under the same leading from Aldermanbury to property belonging to the lessors and coloured blue on the said plan." The part coloured blue on the plan included half of the north wall, the remaining half being included in the demise of No. 17. By another lease of even date the defendants demised to the plaintiff No. 17 for a similar term. Each of the leases contained a covenant by the defendants in the usual form for quiet enjoyment, and a covenant by the plaintiff to repair, maintain, and uphold the buildings erected on the pieces of land thereby demised.

The following further description of the passage and of the acts of the defendants which formed the grounds of complaint in this action are taken from his Lordship's considered judgment:—

"The sides of the passage were the north and south walls to which I have referred. There was a fireproof division between the passage and the first floor above it, and there was also on the under side of the passage a concrete floor dividing it from the space below. The walls of the passage were faced with glazed bricks. On the east side of the building the passage was continued by a bridge which connected it with the Guildhall, and this bridge had some steps in it leading up to the higher level of the entrance to the Guildhall. There is a step rising from the pavement to the entrance to the passage, and the pavement is of course above the level of Aldermanbury. At the entrance to the passage from Aldermanbury there are some handsome double doors, the opening being about six feet. The floor of the passage and bridge was laid in 'Terrazzo,' with the exception of the part nearest the door, which was made of mosaic. Beneath this passage was a space of the same width bounded, like the passage, by the same north and south walls, and having a trapdoor from the passage opening into it. This was the condition of affairs in the year 1897.

"I will now state shortly what the defendants have done. In July, 1914, the defendants, having in hand extensive alterations of a considerable portion of the Guildhall buildings, broke down and removed the greater part of the floor of the passage, and constructed a temporary timber roadway with a slope of 1 in $5\frac{3}{4}$ from the mosaic near the entrance of the passage down to the vacant piece of land between Nos. 15, 16, and 17 and the west side of the Guildhall, in order to provide a means of carting away the rubbish arising from the work of demolition in the Guildhall and bringing to the Guildhall bricks and other building material. In the course of doing this their workmen cut away the concrete, and in parts some of the brickwork in the wall on the south side of the passage, in order to be able to move the iron girders which ran across and supported the floor of the passage, and then they pulled or wrenched out the girders from the holes in the north wall. The evidence does not establish to my satisfaction that they cut into the north wall, though, no doubt, in the course of their operations they 'spalled' or broke off the corners of a few of the bricks. This, perhaps, is not very material; for if the wall belongs to the plaintiff, the defendants would be responsible for removing those portions of the girders which were in and formed part of the wall. The concrete floor of the passage rested in chases in the north and south walls, some two inches in depth, and in the course of the operations the concrete in these chases was removed. The girders rested in holes in the brickwork, the holes being some four and a half inches deep in the south wall, and some eight or nine inches deep in the north wall, and the removal of the girders left these holes vacant. There was some controversy on the question whether, when the girders were inserted, the space surrounding them was filled in with concrete. There is certainly one case in which this was not done; for, in the case of the one girder which it is possible to test, I found when I viewed the passage that there was a space between the end of the girder and the brickwork above, and that the space between the end of the girder and the brickwork was not filled up with concrete, and that this was also the case on the further side of the girder."

The whole block of buildings had been originally built for the purpose of letting out the same in various suites of offices in which different kinds of commercial trade and business and clerical work could be carried on, and the plaintiff had in fact let out the same for such purposes. The tenants of the plaintiff had made serious complaint of the nuisance occasioned by the noise made by the breaking up of the concrete and mosaic floor of the passage and by the operations of the defendants.

In consequence of the acts of the defendants above described the plaintiff commenced these proceedings, claiming an injunction to restrain the defendants (1.) from permitting to remain removed and destroyed the floor, ceiling, and joists of the passage; (2.) from cutting, injuring, or otherwise damaging the walls of Nos. 16 and 17, Aldermanbury, and from cutting, removing, or otherwise causing damage to the joists in the floor or pavement of the passage, and from altering the level of the passage; (3.) from knocking, hammering, or otherwise causing such noise as to create a nuisance or disturbance to the plaintiff and his lessees and tenants of the said premises, and from interfering with or disturbing the right of quiet enjoyment of the premises demised by the two leases of October 28, 1897; and (4.) from using the passage for wheeled cart or other heavy traffic. He also claimed an order for the reinstatement of the floor, ceiling, and joists of the passage, and damages.

Hughes, K.C., and *Whinney*, for the plaintiff. All the floors and walls of the building Nos. 15 and 16, Aldermanbury, including bricks, mortar, and everything, were demised to the plaintiff, and for the defendants to interfere with them except for purposes of user contemplated by the lease is a trespass. The defendants have only excepted out of the demise the air space between the two walls of the passage, the floor and the ceiling, and a similar air space in the basement.

But even if the floor was excepted out of the demise, there is an implied obligation on the defendants that the interest and user reserved to them should be limited by the common intent of the parties when these relations were entered into as to the purposes to which the building should be put: *Lyttelton Times Co.* v. *Warners* (1); *Jones* v. *Pritchard* (2); and the defendants can only use the passage for foot passengers; the whole style and decoration of the passage are inconsistent with the user to which the defendants have put it.

Moreover the plaintiff is entitled to the undiminished support of his building, and what the defendants have done has diminished that

(1) [1907] A. C. 476, 481. (2) [1908] 1 Ch. 630, 635, 636.

support and constitutes a trespass : *Caledonian Ry. Co.* v. *Sprot* (1) ; *Richards* v. *Rose* (2) ; *Rigby* v. *Bennett.* (3) The principle of support of adjacent buildings applies a fortiori in the case of two parts of the same building separated horizontally instead of vertically, where one part must have the support of the other. The joists inserted in the walls are part of the walls.

What the defendants are doing is a breach of covenant for quiet enjoyment : *Sanderson* v. *Berwick-upon-Tweed Corporation* (4) ; *Robinson* v. *Kilvert* (5) ; *Davis* v. *Town Properties Investment Corporation* (6) ; and also constitutes a nuisance in respect of which the plaintiff is entitled to an injunction.

P. O. Lawrence, K.C., and *W. A. Peck*, for the defendants. The whole question turns upon the construction of the demise and exception in the lease to the plaintiff. The defendants have reserved the way or passage, half the north wall, and the basement by way of exception out of the demise in the lease, and that is in effect a regrant. They can use for all lawful purposes what they have reserved : *Reilly* v. *Booth* (7) ; *Jones* v. *Pritchard.* (8)

The defendants paid for the flooring and joists of the passage because it belonged to them, and the plaintiff has no property whatever in the floor of the passage and basement. The defendants could decorate the passage or not as they pleased, and it is idle to say that their decoration of it has prescribed the user. The defendants have the freehold of it, and they can change the user from time to time on their own property provided that they do not injure the plaintiff's property. The defendants do not appear to have reserved the property in the south wall of the passage, but what they have done to the south wall has not weakened it in fact, and does not entitle the plaintiff to recover damages.

Whatever has been done in this case was not a breach of the covenant for quiet enjoyment or an interruption of the plaintiff's holding or possession : *Jenkins* v. *Jackson.* (9) Such nuisance as the defendants may have caused was only temporary and affords

(1) (1856) 2 Macq. 449, 450.
(2) (1853) 9 Ex. 218, 220.
(3) (1882) 21 Ch. D. 559, 569.
(4) (1884) 13 Q. B. D. 547, 551.
(5) (1889) 41 Ch. D. 88, 96, 97.
(6) [1903] 1 Ch. 797.
(7) 44 Ch. D. 12.
(8) [1908] 1 Ch. 630, 635, 636.
(9) 40 Ch. D. 71.

no ground for an injunction: *Harrison* v. *Southwark and Vauxhall Water Co.* (1)

Hughes, K.C., in reply. There has been an actual trespass both to the south wall, which is admitted, and to the north wall, which is in issue. Further, the removal of the floor of the passage and the kind of user which the defendants are asserting are an actionable wrong both on the ground of breach of covenant for quiet enjoyment and of derogation from grant.

First, on the question of trespass. In the building agreement none of the frontage was reserved. The whole building had been erected at the date of the lease and was demised by it, including the floor of the passage. The only exception out of the demise was of the way or passage and the basement, also the space above the floor. The plan on the lease was inaccurately coloured, and half the north wall, which, as we submit, was coloured blue by mistake, was comprised in the demise.

[PETERSON J. There has been no proceeding for rectification and I must look at the plan as it stands.]

Where a building is divided up, the Court is at liberty to look at the whole of the circumstances in order to decide the rights of the parties: *Richards* v. *Rose.* (2)

In this case the whole of the building has been demised, every brick of it, and the demise of a building, or even of a room, includes the outer walls: *Carlisle Café Co.* v. *Muse Brothers* (3); *Hope Brothers* v. *Cowan* (4); *Goldfoot* v. *Welch.* (5) What the defendants have done has not only been a trespass, but has also injured and weakened the walls and the plaintiff's right of support. The evidence shows that in places they have reduced the thickness of the wall from eighteen to sixteen inches, and removed the tie constituted by the floor of the passage.

Further, the acts of the defendants amount to a breach of their covenant for quiet enjoyment and to a derogation from grant: *Robinson* v. *Kilvert* (6); *Sanderson* v. *Berwick-upon-Tweed Corporation.* (7) The damage to the walls and the taking up of the

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(1) [1891] 2 Ch. 409.
(2) 9 Ex. 218.
(3) (1897) 67 L. J. (Ch.) 53.
(4) [1913] 2 Ch. 312.
(5) [1914] 1 Ch. 213.
(6) 41 Ch. D. 88, 96, 97.
(7) 13 Q. B. D. 547.

PETERSON J.

1916

PHELPS v. CITY OF LONDON CORPORATION.

floor were an interruption. The removal of the floor and the user of carts were an interference with the mutual rights of the parties: *Jones* v. *Pritchard* (1); *Lyttelton Times Co.* v. *Warners* (2); *Pwllbach Colliery Co.* v. *Woodman* (3); *Reilly* v. *Booth.* (4) The passage was intended for foot passengers only; it was never intended to use it for horses and carts, and the way in which it was built was wholly inconsistent with such user.

Cur. adv. vult.

April 10. PETERSON J., after stating the facts, continued: The plaintiff contends that the north and south walls are included in the demise to him, and that the defendants by their operations have trespassed on both these walls. He also contends that the floor of the passage is included in the demise to him, and that the defendants were guilty of trespass in breaking down and removing that floor. Alternatively, he says that even if the floor was not included in the demise, there was an implied obligation on the part of the defendants to use that which was reserved to them only as a passage and basement and to keep them in the condition in which they were at the date of the lease; and, further, he contends that, in any case, he was entitled to the support to his building afforded by the two walls and the floor, and that by reason of the defendants' operations his building has been rendered less secure and more unstable.

So far as the south wall is concerned, there has not been any serious contention before me that the defendants had any justification for cutting into this wall or for taking out those parts of the girders which were pinned into that wall; and, so far as that wall is concerned, the plaintiff is entitled to relief for the trespass which has been committed.

The questions relating to the north wall stand, however, on a different basis; and for their determination it is necessary to ascertain what is the true construction of the reservation in the lease of 1897, and whether the floor and the north wall of the passage were demised to the plaintiff or whether they were included in the reservation to the defendants. The lease demises "All that piece or parcel of ground together with the messuages or tenements thereupon erected situate and being Nos. 15 and 16 on the east side of Aldermanbury in the city of London containing from south to north on the west side fronting Aldermanbury aforesaid 51′ 6″ of assize." Then there are various other measurements, and it is stated that it is coloured pink. Then the reservation is: "save and except out of this demise the way or passage and basement under the same leading from Aldermanbury to property belonging to the lessors and coloured blue on the said plan." The plaintiff's contention is that the defendants have only reserved the air space between the two walls, the floor, and the ceiling of the passage, and a similar air space in the case of the basement. The defendants in that case would only be owners of the air space in the passage, with, I suppose, an implied right to use the floor for purposes of passing to and fro. Now, the exception is of the way or passage leading from Aldermanbury to the defendants' property "and coloured blue on the plan." If I turn to the plan I find that the part coloured blue includes half of the north wall, the remaining half being included in the demise of No. 17. It is said that this is a mistake; but I am not satisfied that this is so. It may well have been that it was thought that the owners of those parts of the basement and ground floor which adjoin No. 17 should have half of the north wall, while the leaseholder of Nos. 15 and 16 should have that half which is their northern boundary of the upper floors. This kind of contention seems to have been raised in *Carlisle Café Co.* v. *Muse Brothers.* (1) In that case, as in the subsequent cases of *Hope Brothers* v. *Cowan* (2) and *Goldfoot* v. *Welch* (3), it was held that a simple demise of a room carried with it the external wall of the room, and not only the inside of the wall. As Joyce J. said in *Hope Brothers* v. *Cowan* (2), "The demise of a room must necessarily include, unless it be excepted, some part of the wall which bounds it." The walls are, in fact, part of the room. In the case of an external wall the demise of a room includes the whole of the wall, while in the case of a partition wall it seems to be clear that some part of the wall is included in the demise. It is, therefore, not surprising that in this lease one half of the north wall of the passage and basement should be expressly excepted or reserved as part of

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(1) [1908] 1 Ch. 630.

(2) [1907] A. C. 476.

(3) [1915] A. C. 634, 646, 647.

(4) 44 Ch. D. 12.

(1) 67 L. J. (Ch.) 53.
(2) [1913] 2 Ch. 312, 316.
(3) [1914] 1 Ch. 213.

the passage or basement, by way of making it clear that it belongs to the lessor as the owner of the passage or basement and that no part of the south wall is excepted or reserved. In my judgment, the property in one half of the north wall of the passage and basement has been reserved to the defendants and is not included in the demise to the plaintiff.

By a similar course of reasoning I have come to the conclusion that the concrete floor which divided the passage from the basement was also reserved to the defendants by the lease. The floor is part of the passage and the ceiling is part of the basement; and I do not see any difference in law between the horizontal division between an upper and a lower room and the vertical division between two adjoining rooms. The defendants did not, therefore, commit any trespass in removing the floor of the passage or withdrawing the girders from the north wall.

But it is said that, if this be so, the defendants were not entitled to remove the floor of the passage and were bound to use the passage and basement in the condition in which they were at the date of the lease; and, indeed, the plaintiff's argument included the contention that the defendants could only use the passage as a passage and could not use it for any other purpose. But, if two adjoining rooms in a house are granted to a man, I do not know of any legal principle which would prevent him from pulling down the partition wall and throwing the two rooms into one, provided he did not injuriously affect the stability of the rest of the building. The rooms are his property, and he can make any lawful use of his property so long as he does not, by withdrawing support or otherwise, injure the rest of the building. In *Reilly* v. *Booth* (1) there was a conveyance of a "gateway" or passage leading from a street through a house to premises at the rear. The Court of Appeal held that the conveyance of the strip of land in question, under the description of a "gateway," did not limit the use to which it might be put, and that it could be used in any way or for any purpose which the law would allow, and which did not interfere with the rights of the neighbours. Reliance was placed on *Lyttelton Times Co.* v. *Warners* (2) and *Pwllbach Colliery Co.* v. *Woodman.* (3) But these cases do not appear to me

(1) 44 Ch. D. 12.

(2) [1907] A. C. 476.

(3) [1915] A. C. 634.

to be relevant to the present case. In the former case the appellants carried on business as printers and publishers in premises next to an hotel belonging to the respondents. It was agreed between them that the appellants' premises should be rebuilt and that the appellants should continue their business on the lower floor and lease the upper floors to the respondents for use as bedrooms in connection with the hotel. The respondents subsequently found that, contrary to the expectation of both parties, the printing business carried on upon the ground floor was very disturbing to their bedrooms in the upper floors. It was held by the House of Lords that, having regard to the common intention that the appellants should carry on their printing business, the respondents could not complain. The scheme was that the appellants should rebuild and should continue their business in the new premises as before and let off the upper part to the respondents; and it would obviously be unjust that the respondents should enjoy that part of the joint scheme which was for their benefit and at the same time prevent the appellants from enjoying the benefit which had been intended for them. *Pwllbach Colliery Co.* v. *Woodman* (1) is a very different case from the present; and indeed it was only referred to for the observations of Lord Parker. His Lordship there says: "The second class of cases in which easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be used." Then he refers to *Jones* v. *Pritchard* (2) and *Lyttelton Times Co.* v. *Warners.* (3) "But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use." The plaintiff relies on these words as showing that I can imply in his favour a right to compel the defendants to continue to use the passage and basement as a passage and basement and for no other purpose. But I do not think that Lord Parker ever contemplated such an application of his words. He was referring to cases in which two persons are entitled to adjoining houses or land in circumstances in which the law implies an easement of support or a right of way or some other easement in favour of one over or in respect of the property of the other. The claim in the present case is not for an easement over the defendants' property; it is a claim that the defendants shall not use their own property in any but one way. In any case, I am unable to imply such a right on the part of the plaintiff or such an obligation on the part of the defendants. The argument led to the contention that the passage could not be used for storage, and would apparently involve the proposition that the defendants could not even close up the east end of the passage if they thought that course was desirable. In my judgment, therefore, this contention fails.

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(1) [1915] A. C. 634, 646, 647. (2) [1908] 1 Ch. 630.
(3) [1907] A. C. 476.

The next contention on behalf of the plaintiff was that the defendants' operations have diminished the stability of the building by withdrawing the "tie" afforded by the floor of the passage, and by lessening the thickness of the north and south walls. So far as the south wall is concerned, the question is not very material, as I have already expressed the opinion that the defendants are responsible for their trespass; but I may add, so that there may be no doubt as to the view which I take, that what has been done to that wall has not affected the stability of the wall. The plaintiff contends that the removal of the concrete in the two-inch chase in the north wall has converted the wall into a sixteen-inch wall instead of an eighteen-inch wall, and that this fact coupled with the removal of the "tie" of the passage floor has withdrawn support to a material extent from the north wall. No doubt the support is less than it was. The removal of a single brick diminishes the solidity of a wall. But it is not every diminution of support which constitutes a ground of action. In the case, for instance, of a house entitled to the support of mines below it, the owner of the mines can work his minerals so long as he leaves sufficient support for the house. I have therefore to consider on the evidence which I have heard whether the defendants' operations have imperilled the stability of the north wall. Now I have the guidance of a crucial experiment. The work complained of was finished in July, 1914. In the autumn of 1915 a German airship dropped a bomb on Nos. 15 and 16, and a violent explosion occurred in the upper floor, which was so powerful that it very seriously damaged the north wall at the fourth floor level. But, enormous as the shock was, there is not a single crack in the wall in the lower storeys. The conclusion at which I have arrived is that the north wall is perfectly solid and stable, and that it now has all necessary support.

The last complaint which the plaintiff puts forward is founded on noise; he claims to be entitled to relief against a nuisance or against a breach of the covenant for quiet enjoyment. So far as nuisance is concerned, it is temporary and does not constitute a cause of action: *Harrison* v. *Southwark and Vauxhall Water Co.* (1) Moreover, a temporary inconvenience, such as this, is not a breach of the covenant for quiet enjoyment: *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (2); and it is at least doubtful whether a nuisance by noise is a breach of such a covenant: *Jenkins* v. *Jackson.* (3)

As to the future, I am unable to say whether the use of the slope as a cartway will or will not produce such an amount of noise as to amount to a nuisance to those who are affected by it. The defendants may adopt means which will remove all ground of complaint, or they may possibly conduct their operations in such a way as to preclude them from relying upon the defence that the nuisance is only a temporary one. The result is that the plaintiff succeeds in his claim for trespass to the south wall, but fails in all the other issues in the action.

Solicitors: *Biddle, Thorne, Welsford & Gait; the City Solicitor.*

(1) [1891] 2 Ch. 409.
(2) [1898] 2 Ch. 394, 401.
(3) 40 Ch. D. 71.

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Applied. *Re* OPPENHEIMER, [1948] Ch. 721

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April 12, 13.

In re SCOTT.

SCOTT *v.* SCOTT.

[1912 S. 523.]

Revenue—English Domicil—Specific Bequest of Foreign Chattels—Works of Art—Certificate of Exemption from Duties until Sale—Sale of Chattels—Incidence of Duties—Estate Duty—Legacy Duty—" Enjoyment in kind "—Property passing to " Executor as such "—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 6, 8, 9—*Finance Act,* 1896 (59 *&* 60 *Vict. c.* 28), *s.* 20—*Finance* (1909-10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *ss.* 63, 96.

By s. 20 of the Act of 1896, as extended and amended by ss. 63 and 96 of the Act of 1910 (except as to persons dying before April 30, 1909), property passing on the death of a deceased person, whether settled or not, and consisting of "objects of national, scientific, historic, or artistic interest," forms an estate by itself and, "while enjoyed in kind," is exempt from estate and legacy and succession duty. But if it is sold the person selling it, or for whose benefit it is sold, is the person accountable for and liable to pay the duty.

A testator, domiciled in England, died in January, 1912, and by his will bequeathed free of legacy duty to S. absolutely a valuable collection of works of art and other chattels at his apartments in Paris. In July, 1912, the executors applied to the Treasury under s. 20 of the Act of 1896 and s. 63 of the Act of 1910 for a certificate of exemption from duties until sale for such of the French chattels as were objects of national, scientific, historic, or artistic interest. On June 2, 1914, the executors assented to the bequest of the French chattels and forthwith delivered them to S., and she immediately on the same day delivered them to a purchaser, to whom she had contracted to sell them in December, 1912. The Treasury certificate specified and declared 80 per cent. in value of the chattels to be within the exemption of the sections. On the question whether S. or the residuary personal estate of the testator was liable to pay the English estate and legacy duties in respect of (1.) the chattels comprised in the certificate of exemption, and (2.) the chattels not included in that certificate :—

Held, (1.) affirming the decision of Neville J., on the construction of ss. 20 and 63, that no distinction could be drawn between enjoyment in kind for a moment and for a period of years ; that S. had "enjoyed in kind," although only for a most transient period, and was therefore under s. 20 the person liable to account for and to pay the estate duty in respect of the exempted chattels ; (2.) reversing the decision of Neville J., that the direction that the chattels were to be free of legacy duty was not limited to duty payable upon the testator's death, but extended to duty payable by S. in the event of the chattels being sold by her; and consequently that the legacy duty was payable out of residue; (3.) by Neville J. (the hearing of the appeal upon this point being adjourned), that the estate and legacy duties in respect of the chattels not within the certificate of exemption were payable out of the residuary personal estate (the gift being free of legacy duty), for that all the personal estate, wheresoever situate, of a testator domiciled in England passes to his "executor as such" within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894, although as to personalty situate abroad he may have to take some proceedings in a foreign tribunal to obtain possession of them.

The principle of *In re Hadley* [1909] 1 Ch. 20 applied.

In re Leconfield (1904) 90 L. T. 399 distinguished.

In re Lord Swaythling (1912) 29 Times L. R. 88 disapproved.

ADJOURNED SUMMONS.

This was an application which raised questions as to the incidence of the estate duty and legacy duty on certain French chattels passing under the will of the late Sir John Murray Scott, Bart.

The testator by his will, dated October 26, 1900, bequeathed to Lady Sackville "for her sole and separate use and free of legacy duty all my pictures engravings furniture busts silver plate and works of art of every description wheresoever situate" except at 5, Connaught Place and 8, Chandos Street, London, or wherever might be situate his London house, or except those bequeathed specifically by that his will or any codicil thereto; and after divers other specific and pecuniary bequests the testator gave his residuary real and personal estate upon certain trusts. The testator made various codicils to his will dated after the passing of the Finance Act, 1910, which did not affect the questions arising upon this summons. The testator died in January, 1912.

The testator was a domiciled Englishman, and at the date of his death was possessed of a large and valuable collection of pictures, works of art, and articles of historic and national interest at his apartments in the Rue Lafitte in Paris. The estimated value of these French chattels was about 300,000*l*.

Numerous questions arose under the will and codicils of the testator, and in February, 1912, before probate, this action was commenced for the administration of the real and personal estate of the testator and of the trusts of his will and codicils, and one of the executors was appointed receiver of the real and personal estate.

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The plaintiffs were some of the residuary legatees, including one of the executors. The defendants were the other executor and the other residuary legatees. Subsequently Lady Sackville was added as a defendant. In May, 1912, the executors took proceedings in the Probate Division to have the testator's will and codicils established, and in July, 1913, they obtained probate. After probate was granted an administration decree was made, and the receiver was continued and remained in possession of the French chattels until the assent of the executors hereafter stated.

In February, 1914, an order was made on the application of the plaintiffs which declared that Lady Sackville was liable to pay the French mutation duty in respect of the portion of the testator's estate in France passing to her: see *In re Scott, Scott* v. *Scott.* (1)

In July, 1912, the executors applied to the Treasury under s. 20 of the Finance Act, 1896, as amended by s. 63 of the Finance (1909-10) Act, 1910, for a certificate of exemption from payment of duties until sale of such of the French chattels as were objects of national, scientific, historic, or artistic interest. Lady Sackville did not concur in this application; on the contrary she objected to it.

By an order made on May 12, 1914, on the application of Lady Sackville, the executors were ordered to assent to the specific bequest of the French chattels and to deliver the same forthwith to her, and on June 2, 1914, the executors gave their assent and by their agent delivered the chattels to Lady Sackville's agent in Paris, and he on the same day immediately delivered the same to a Mr. Seligmann, to whom she had contracted to sell them in December, 1912.

In July, 1914, the Treasury issued their certificate of exemption under ss. 20 and 63 declaring that certain of the chattels—about 80 per cent. in value—came within the exemptions specified in the sections.

The English estate and legacy duties in respect of the French chattels amounted to 60,000*l.* and had been paid in the first instance by the executors. The question now arose whether Lady Sackville or the residuary personal estate of the testator was liable for these duties in respect of (1.) the chattels included in the certificate of exemption, and (2.) the chattels not comprised in that certificate. Lady Sackville took out a summons to determine the matter.

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(1) [1914] 1 Ch. 847; on appeal [1915] 1 Ch. 592.

The summons came on for hearing before Neville J. on November 4, 1915.

Maugham, K.C., and *Dighton Pollock*, for the summons. The first point depends upon whether the exempted chattels were "enjoyed in kind" by Lady Sackville within the meaning of s. 20 of the Finance Act, 1896, as extended and amended by ss. 63 and 96 of the Act of 1910. (1) It is submitted that they were not, and that the sections do not apply where there has not been actual enjoyment in kind. For instance the sections have no operation where the property is included in a residuary gift which has to be sold, or is given on trust for sale, or which is in fact sold by the legatee before ever it is enjoyed. Looking at the intention underlying the sections, they are passed so as not to compel people to sell the property so long as there is real enjoyment in kind. It is the actual enjoyment in specie which postpones the payment of the duty until sale, but there can be no actual enjoyment without possession.

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(1) Sect. 20 of the Finance Act, 1896, as amended by s. 96 of the Finance (1909-10) Act, 1910, (except as respects persons dying before April 30, 1909) enacts:

"(1.) Where any property passing on the death of a deceased person consists of such pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income as appear to the Treasury to be of national, scientific, or historic interest, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself, and, while enjoyed in kind, be exempt from estate duty, but if it is sold shall become liable to estate duty.

"(2.) The person selling the same, or for whose benefit the same is sold, shall be accountable for the duty, and shall deliver an account, in accordance with section eight of the principal Act, in the case of a sale within one month after the sale."

The Act of 1910, s. 63, enacts: "In the case of any person dying on or after the 30th of April, nineteen hundred and nine, section 20 of the Finance Act, 1896, (which gives an exemption for objects of national, scientific, or historic interest) shall be extended so as to give an exemption from legacy and succession duty as well as from estate duty, and as so extended shall take effect whether the property in respect of which the exemption is given is settled or not, and as if the reference therein to national, scientific, or historic interest included a reference to artistic interest, and duty shall only become chargeable when the property is sold, and then only in respect of the last death on which the property passed."

[NEVILLE J. For how long? A year, six months, ten minutes, or a minute? If a minute will not be sufficient, why should five or ten years? That is the real question. Here there was delivery, first of all, to the lady, and then by her or her agent to her purchaser. But, so far as the testator was concerned, at the moment when delivery was made to her she was enjoying in kind. True it is, if you please, that it was only for a minute or a second, but there was enjoyment in specie. That is the point you have to meet.]

Lady Sackville did not join in the application for a certificate of exemption. She strongly objected to any certificate being given. It is submitted that if the specific legatee of a work of art does not choose to enjoy it in kind but sells it before it reaches him—sells it at once—there is no reason why an act of the Treasury at the instance of the executors should have any operation whatever under the sections.

[NEVILLE J. The legatee of a specific chattel, prior to the assent of the executor, has no property in the chattel. He has nothing to sell. He has only a possibility. On the assent being given he is entitled to enjoyment in kind.]

There must be some limit to s. 20. The person pointed at has really to enjoy in kind for a longer or shorter period, and it is submitted that if there is no such enjoyment the section does not operate. If there is no limit, you alter the incidence of the duty in a case where there has been no postponement of the sale. There are only two reported cases on the section. The case of *In re Leconfield* (1) turned entirely on the particular language of the will. But *In re Lord Swaythling* (2), so far as it goes, decides that if the section applies the legacy duty is payable by the legatee although by the will the legacy is given free of legacy duty, and we admit that decision is not open to dispute in this Court.

Jenkins, K.C., and *MacSwinney*, for the plaintiffs, and *Peterson, K.C.*, and *J. Franey* (for *F. L. Errington*, serving with His Majesty's Forces), for the defendants other than Lady Sackville, were not called upon.

(1) 90 L. T. 399. (2) 29 Times L. R. 88.

NEVILLE J. Sect. 20 of the Act of 1896 has been amended by s. 63 of the Act of 1910, and it is perhaps a little difficult to see exactly what the result of the later statute has been upon the earlier one. Sect. 20 relates only to property enjoyed in succession. It seems to me not to raise the difficulties which the exclusion of those words by the section in the later Act has led to; but I think, as Mr. Maugham argued, one must consider what apparently the Legislature was aiming at, and must take the sections as a whole in order to ascertain to what particular conditions the legislation really applies, because the words of the direction to segregate works of national interest so as to form a separate estate cannot, I think, be taken by themselves. They must be read in connection with the whole of the section, and the conclusion to which I have come is that the two sections together must be limited to cases where, upon the passing on the death of a deceased person of chattels of this nature, some one has the right of enjoyment in specie. In the present case there is no doubt that by virtue of the will Lady Sackville had the right of enjoyment in specie to these chattels; but the point raised is this. It is said that the segregation of the chattels and the postponement of the duties payable in respect of them continued only until the sale of them by the owner; and it is urged that here Lady Sackville had sold the chattels before the assent of the executors, and consequently there never was anybody under the will who could be said to have enjoyed them in kind. It seems to me, however, that you cannot draw any distinction between enjoyment for a moment and enjoyment for fifty years, and I think what you have to consider is whether these chattels were ever enjoyed in specie at all—" enjoyed in kind," as the section says. It seems to me that they were. I think the effect of the assent of the executors must have been to pass the property in these chattels to Lady Sackville, and although she immediately through her agent delivered them over to the purchaser, I do not think that prevents her having enjoyed them in kind, although only for a most transient period. It seems to me, therefore, that these sections do apply and that the provisions contained in them must take effect. The result is that the estate duty is payable by Lady Sackville, and that the clause in the will of exemption from legacy duty does not take effect. Mr. Maugham did not argue the latter point, and I therefore treat it as concluded by the judgment I have delivered.

Maugham, K.C. Quite so. I apprehend your Lordship's decision in *In re Lord Swaythling* (1) really covers that point.

The second question was then argued.

The affidavits of M. Champeaux, M. Henri Mesnil, and other French advocates as to the French law with regard to personalty locally situate in France and bequeathed by the will of an English testator were read. The substance of their evidence is sufficiently noticed in the arguments and judgment.

Maugham, K.C., and *Dighton Pollock*, for the summons. The point is whether personalty situate abroad at the date of the death of a testator domiciled in England passes to his executor "as such" within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894. By s. 6, sub-s. 2, of the Act an executor has to pay estate duty on all the personal property, wherever situate, of which a deceased was competent to dispose, and by s. 8, sub-s. 3, the executor has to account for the estate duty in respect of all the personal property, wherever situate, of which the deceased was competent to dispose at his death. But by s. 9, sub-s. 1, a rateable proportion of the duty is a first charge on any property which "does not pass to the executor as such," and is by sub-s. 4 recoverable by the executor if he pays it for the owner of the property. Here the executors were bound to pay the estate duty on the French chattels in order to obtain probate, and the test is, did the chattels pass under the will to the executors as such, i.e., in their character as executors, or in some other capacity, such as trustees or legatees? *In re Hadley.* (2) If the property passed to them in their character of executors they must pay the duty. On the authorities all the personal estate situate abroad of a testator domiciled in England passes under his will to his executors as such, and the French law has no application.

[They were stopped.]

Jenkins, K.C., and *MacSwinney*, for the plaintiffs. The question really is, did the appointment of the executors as executors by the will followed by the grant to them of probate in this country enable them by virtue of that and nothing more to recover possession of these chattels which were in France ? In other words, do foreign movables locally situate abroad pass to the executor of an English will of a domiciled Englishman virtute officii when he cannot obtain possession of them without getting some other local grant in a foreign jurisdiction ? It is submitted that they do not pass to the executor "as such," and therefore the estate duty on them is not payable out of the residuary estate. According to the French law an English executor is not recognized and cannot recover possession of or sue for movable assets in France until he produces the probate and obtains an exequatur from the French tribunals, and with regard to chattels specifically bequeathed he has no right to be put in possession of them as against the specific legatee. Here the executors have not applied for an exequatur. By arrangement the receiver remained in possession, but his possession decides nothing. It merely kept the chattels in medio until the assent of the executors. The decisions of Warrington J. and of the Court of Appeal in the case of *In re Scott, Scott* v. *Scott* (1), where Lady Sackville was held liable to pay the French mutation duties, is inconsistent with the view now put forward on her behalf. It is submitted that *In re Hadley* (2) is not against us, and that foreign movables do not pass to the executor virtute officii, "as such," if at the most his right is to go and get a grant in another jurisdiction to enable him to get possession of them : *In re De Sommery* (3) ; *Attorney-General* v. *Brunning* (4) ; *Blackwood* v. *Reg.* (5) ; *Ewing* v. *Orr Ewing* (6) ; *In re Dixon* (7) ; Dicey's Conflict of Laws, 2nd ed. pp. 343-4, 348-9 ; Story's Conflict of Laws, p. 735, § 516.

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(1) 29 Times L. R. 88.

(2) [1909] 1 Ch. 20.

Peterson, *K.C.*, and *J. Franey* (for *F. L. Errington*, serving with His Majesty's Forces), for the defendants other than Lady Sackville, adopted the same line of argument and cited *In re Power* (8) and Hanson on Death Duties, 6th ed. p. 139, note to s. 6 of the Act of 1894.

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(1) [1914] 1 Ch. 847 ; [1915] 1 Ch. 592.

(2) [1909] 1 Ch. 20.

(3) [1912] 2 Ch. 622.

(4) (1860) 8 H. L. C. 243, 258.

(5) (1882) 8 App. Cas. 82.

(6) (1883) 9 App. Cas. 34.

(7) [1902] 1 Ch. 248, 251.

(8) [1901] 2 Ch. 659, 664.

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Maugham, K.C., in reply. *In re Hadley* (1) does not decide that "as such" means virtute officii. "Property passing to the executor as such" is a phrase more extensive than "property passing to the executor virtute officii" and is equivalent to "property for which the executor would have to account as assets." I submit virtute officii means as executor by virtue of an English probate or an English grant of administration, which is limited to all the property of the deceased within the jurisdiction: *Attorney-General* v. *Dimond* (2); but the whole of the personal assets, whether within or without the jurisdiction, are assets of the estate and pass to the executor: *Blackwood* v. *Reg.* (3); *Dowdale's Case* (4); Dicey's Conflict of Laws, 2nd ed. pp. 346-7; Williams on Executors, 10th ed. vol. ii. pp. 1283 et seq.

Cur. adv. vult.

1915. Nov. 17. NEVILLE J. The testator, a domiciled Englishman, died possessed of chattels in France. By an English will he bequeathed them specifically. The question is whether these chattels on the death of the testator passed to his executors as such within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894. If they did, then the estate duty will be payable by the executors out of the general estate; if not, then the duty will be charged upon the legacy. It is contended on the one side that "executor as such" is inserted in the section as a free translation of "virtute officii"; that the meaning of "virtute officii" has been determined by judicial decision to apply only to cases where the title of the executor is complete upon the production of the English probate, and consequently is excluded in the case of chattels out of the jurisdiction at the date of the death.

In my opinion the destination of the chattels has to be determined by English law. Upon the evidence before me I come to the conclusion that by French law the English law is recognized in regard to chattels situate in France of a domiciled Englishman, and that, subject to local obligations, upon his taking out an exequatur the French Courts will put him in possession. In the present case the executors did not recover possession of the chattels, but they were taken possession of by a receiver appointed in an administration action by the English Courts, and delivered to the specific legatee after the assent of the executors to the legacy had been given in accordance with the order of the English Court.

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(1) [1909] 1 Ch. 20.

(2) (1831) 1 Cr. & J. 356.

(3) 8 App. Cas. 82.

(4) (1605) 6 Rep. 46b.

In my opinion the title of the executor is not limited to chattels into possession of which he is put by the probate, but in view of the English law extends to foreign chattels, although by the local law something more is required than production of the probate in order to obtain possession. It appears to me that the executor derives his title in the first instance from the testator, and that the personal assets of the testator vest in him whether they are specifically included in the probate or not. It must be borne in mind that in talking of property and title we are dealing, not with material things, but with legal conceptions which, though useful, are entirely arbitrary in their origin. The rule of the English law, in my opinion, is that the property in the testator's chattels, whether at home or abroad, vests in the executor, and not until he assents do chattels vest in the specific legatee. In my opinion this is true of all the testator's personal assets, although in the case of foreign chattels the local law may make their recovery difficult or impossible. I think in the present case the executors could have recovered the chattels in France, and, if this be so, I think in the view of the English law they would recover them as executors. I fail to see under what other title they could recover them. Except as executors they had no claim to them, either in English or French law. They had no personal claim to them, and they had no claim as trustees.

So far I have considered the question apart from authority. I will proceed shortly to consider some of the cases which have been cited, in order to ascertain whether it is still open to me to give effect to my own view of the meaning of the words "executor as such" contained in the section. In *Dowdale's Case* (1) it seems to have been decided that assets beyond sea, or foreign assets, are assets on a plea of plene administravit. In *Attorney-General* v. *Dimond* (2) it was held that probate duty is not payable in respect of property in a foreign country belonging to a testator dying

(1) 6 Rep. 46b.

(2) 1 Cr. & J. 356, 369, 370.

in this country, although the property be brought into and administered in this country by the executor; but it is said by Lord Lyndhurst, "The effects of the testator are assets wherever situated, whether at home or abroad"; and he points out that "the executor derives his power, not from the probate, but from the will," and cites the authority of Ashhurst J.: "The executor has a right immediately upon the death of the testator; probate is a mere ceremony, but, when passed, the executor does not derive his title under the probate, but under the will. Probate is only evidence of his right." In *Attorney-General* v. *Brunning* (1) Lord Cranworth says that there is no doubt that foreign assets are not liable to probate duty, and that they are not recoverable by virtue of an English probate. In *In re Dixon* (2) Buckley J., in certain interlocutory observations, certainly treats "virtute officii" as synonymous with "as such," and says, referring to *Attorney-General* v. *Hope* (3) and *Attorney-General* v. *Brunning* (1), "Those cases show that an executor takes as such everything which the mere production of the probate entitles him to receive"; and Parker J. in *In re De Sommery* (4) says: "In the present case there is a further reason for holding that the costs in question are not payable out of residue. The twenty-one shares were foreign assets which did not vest in the executors virtute officii, and the evidence is that according to French law an executor would have no right as against the specific legatee to be put into possession of specifically bequeathed property." As already stated, upon the evidence before me I have come to the conclusion that in the case of the will of a domiciled Englishman the French Courts would recognize the English law and, subject to local obligations, give effect to it.

It appears to me that since the decision of the Court of Appeal in *In re Hadley* (5) all the above authorities lose their weight upon the question of the meaning of "executor as such" in the Finance Act. In that case Parker J. expressed the view that he repeated in *In re De Sommery* (4), but I do not think the Court of Appeal concurred in that view. The Master of the Rolls says: "I do not think any assistance can be gained by referring to old authorities dealing with the incidence of probate duty, nor do I think that the language used in the Finance Act ought to be construed with technical narrowness"; and further: "The words 'as such' contemplate rather a case in which a person named as executor may take property in another character, for instance as heir-at-law . . . . and I see no reason to doubt that any property which the executor would have to account for as assets can properly be said to pass to the executor as such." Fletcher Moulton L.J. says: "The presence of the words 'as such' constitutes to my mind no difficulty. It was advisable to insert those words in order to make it clear that property passing to the executor in trust or otherwise by reason of a disposition in the will was not meant to be included"; while Farwell L.J. says: "The plain meaning of 'as such,' to my mind, is 'in the character of executor as distinguished from his personal capacity or as trustee.'" It appears to me that the opinion I have expressed above is in conformity with this authority.

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(1) 8 H. L. C. 243, 259.
(2) [1902] 1 Ch. 248, 251.
(3) (1834) 1 C. M. & R. 530.
(4) [1912] 2 Ch. 622, 628.
(5) [1909] 1 Ch. 20, 21, 29, 30, 33, 36.

H. L. F.

C. A

Lady Sackville appealed against the decision of the learned judge in the first judgment. The appeal came on for hearing on April 12, 1916.

P. O. Lawrence, K.C., *Maugham, K.C.*, and *Dighton Pollock*, for the appellant. The first question arising upon this appeal is as to the incidence of the estate duty upon the chattels in respect of which the certificate of exemption was granted. They were never "enjoyed in kind" by Lady Sackville within the meaning of s. 20 of the Finance Act, 1896, as amended and extended by ss. 63 and 96 of the Act of 1910, she having in fact sold them before they were received by her. They were not therefore exempt from estate duty, and that duty is payable out of the testator's residuary personal estate. The words "while enjoyed in kind" refer to an effectual enjoyment, and it cannot be that a mere momentary enjoyment is enough to bring the section into operation. If there is no enjoyment in kind there is no exemption, and the chattels must be aggregated, with the result that estate duty is payable by the

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executors out of the residuary estate. An enjoyment in kind intended by the testator, but not carried out, is not within the section. The object of the exemption is to induce legatees not to sell objects of national, scientific, historic, or artistic interest which can be enjoyed by them in kind. Sect. 20, sub-s. 1, must be construed as a whole and not piecemeal. The latter part of the sub-section shows that there is to be exemption so long as there is enjoyment in kind. That does not affect the incidence of the duty where for some good reason the property is sold at once on coming to the hands of the legatee, or, as in this case, before she received it from the executors.

As to the direction in the will that the gift of the chattels is to be free of legacy duty, that applies not only to duty payable upon the testator's death, but also to duty which became payable upon the sale by the legatee. *In re Leconfield* (1) is distinguishable from this case, for there the direction to the trustees was to pay out of the residuary estate the duty which should become payable upon or by reason of the testator's death.

Sir R. Finlay, K.C., and *Franey* (for *F. L. Errington*, serving with His Majesty's Forces), for the respondents, the plaintiffs.

[LORD COZENS-HARDY M.R. We do not wish to hear you as to the estate duty.]

Sir R. Finlay, K.C. Where a bequest is made free from legacy duty the direction only applies to duty which becomes payable upon the devolution under the will. It does not apply to duty in respect of which the liability to pay arises subsequently by the act of the legatee. In this case it was the sale which rendered the property liable to duty, and the clause in the will does not apply: *In re Leconfield* (1); *In re Lord Swaythling.* (2) A construction which may keep the estate open for a long period of time is most inconvenient and will not be adopted by the Court. When the chattels were delivered to the legatee they were not liable to duty. The liability to duty arose subsequently upon the sale and must be borne by the legatee.

[PHILLIMORE L.J. If executors hand over dutiable articles which are given free of duty without having paid the duty they have not fulfilled the direction contained in the will.]

(1) 90 L. T. 399.

(2) 29 Times L. R. 88.

At the death of the testator the chattels were not liable to duty. An ordinary bequest of chattels "free of legacy duty" is not an expression of intention by the testator that duty which may never become payable is to be provided for out of residue. The matter must be considered at the time when the bequest takes effect. Duty which becomes payable afterwards is like a new duty levied by a subsequent statute: *In re Baxter.* (1)

Jenkins, K.C., and *MacSwinney*, for the other respondents.

LORD COZENS-HARDY M.R. This is an appeal from the judgment of Neville J., and it raises two rather curious and somewhat difficult points under the Finance Acts of 1896 and 1910. The testator, Sir John Murray Scott, was a man of very great wealth, and by his will, which was executed in 1900, to which there were codicils dated up to July, 1910, he gave works of art of extraordinary value to Lady Sackville for her separate use free of legacy duty. The property was very large, and the properties of special artistic merit were also very large; the properties in France, which were given under bequests in different parts of the will, amounted, I think, to 274,000*l.*, besides what was in England. There was a delay—I will not say a dispute—in proving the will; a suit was instituted in the Probate Court and the will was sustained. In the meantime an application had been made to the Treasury, in whose discretion it is, to say whether any particular pictures, prints, books, manuscripts, works of art, scientific collections, or other things not yielding income were of national, scientific, historic, or artistic interest. The effect of that application, which was partially but not entirely assented to, has been of course largely to diminish the value of the testator's estate upon which estate duty was payable and the question that arises is this. Lady Sackville before probate was granted entered into a contract to sell a large portion of these very valuable properties to a gentleman in Paris for a very large sum of money. The sale was not completed until after the probate was granted, and then the executors having been ordered to assent to the legacy upon a certain undertaking being given by Lady Sackville, they did so, and directly that was done the representative of the executors went over to Paris and in the presence

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(1) (1898) 42 Sol. J. 611.

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of Lady Sackville's representative handed over the articles to the French purchaser. Something similar was done with regard to the English chattels: the most valuable of them, I think, was a bust worth 10,000*l.* The question then arises, What is to be done with reference to the estate duty which is payable upon this portion of the personalty, and what is to be done as regards the legacy duty?

The first question really depends upon the true interpretation of s. 20 of the Act of 1896, having regard to the amendments made in that section by the Act of 1910, s. 63. I will read s. 20 as it has been altered and as we have to construe it: "Where any property passing on the death of a deceased person consists of" property such as that in question, "such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself." That seems to me to be a perfectly clear enactment. Property of this kind is not to be aggregated with the rest of the testator's property: its aggregation may in all probability largely increase the amount of estate duty having regard to the scale; but not only is it not to be aggregated, it is to form an estate by itself. Then the section goes on: "and while enjoyed in kind be exempt from estate duty, but if it is sold shall become liable to estate duty." I confess I have not been able to appreciate the difficulty which is found in construing this section. I do not think we can construe it by reference to the old legislation. It seems to me a plain and intelligible view that special property of this kind is not to be aggregated with the rest of the property, but is to form a separate estate by itself. Then what is to happen with regard to this separate estate itself? So long as it is enjoyed in kind it is exempt from estate duty. If it is sold it becomes liable to estate duty. The language seems to me clear and unambiguous, and I think we must so construe it. That is what is to happen. Sub-s. 2 of s. 20 provides for that: "The person selling the same, or for whose benefit the same is sold, shall be accountable for the duty, and shall deliver an account, in accordance with section eight of the principal Act, in the case of a sale within one month after the sale." The property has been sold by Lady Sackville, and in respect of this separate estate she is the person, and apparently the only person, who is liable to pay estate duty. The contention on the part of

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the appellant is that the estate duty ought to be paid out of the residue. I think that is contrary to the whole meaning of s. 20 and that the view taken by the learned judge upon that point was quite right.

Now we come to s. 63 of the Act of 1910, which throws some light on s. 20 of the earlier Act and enlarges the operation of it: "In the case of any person dying on or after April 30, 1909,"—which applies to this case—"section 20 of the Finance Act, 1896" (which gives an exemption for objects of national, scientific, or historic interest), "shall be extended so as to give an exemption from legacy and succession duty as well as from estate duty, and as so extended shall take effect whether the property in respect of which the exemption is given is settled or not, and as if the reference therein to national, scientific, or historic interest included a reference to artistic interest, and duty shall only become chargeable when the property is sold, and then only in respect of the last death on which the property passed." It was argued before us that s. 20 has no meaning at all unless you can find that there has been an enjoyment by persons in succession. That contention seems to me to be contrary to the plain language of the Act of Parliament, and I am unable to attach any importance to it. I think, therefore, that the learned judge was quite right in saying that estate duty is payable by Lady Sackville under s. 20, sub-s. 2. So much for the first point on the appeal.

The second point is this: These valuable chattels were given to Lady Sackville free of legacy duty quite in common form. Apart from that portion of the will to which I am coming and the Act, what is the meaning of a gift of chattels "free of legacy duty"? It is a specific bequest of the chattels plus a pecuniary legacy of the amount of the duty which will be payable in respect of those chattels. Applying that test, we have to consider what is the effect of that clause in the will, directing the specific gift to be free of legacy duty, in the events which have happened. Until sale no legacy duty was payable; on sale legacy duty became payable. By whom? By Lady Sackville, and the question is whether the direction in the will that the chattels are given free of legacy duty ought to be limited, as Neville J. thought, to legacy duty payable upon and in respect of the testator's own death, or whether the provision under

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the will applies also to legacy duty payable by Lady Sackville in the event, which has happened, of the property being sold by her. I do not attach very much importance to it; but it is worth remarking that the testator made codicils after the date of the Finance Act, 1910, and by the very last codicil showed himself conversant with the provisions of that Act, and when he says I give this to Lady Sackville free of duty, can those words be limited merely to legacy duty which is "payable immediately on my death and in respect of my death"? It is said that that has really been decided in the Court of Appeal in *In re Leconfield* (1), but I do not so read that case. There the language used was this: The executors and trustees were directed to pay so much of the duty and other death duties which "shall become payable upon or by reason of my death." This Court held that those words did not apply to legacy duty which did not become payable upon or in respect of his death, but would only become payable in an event which had not then happened, namely, the sale of the chattel. But here the language of the will is quite general, and I see no reason to limit it in the manner which is sought by the respondents. It seems to me that it applies equally to a contingency upon which legacy duty will be payable by Lady Sackville, a contingency which has already happened and in respect of which she is now liable to legacy duty. With great respect to the learned judge who has decided this very point previously in *In re Lord Swaythling* (2) (he did not give a separate judgment here), I think his view of the statute is not right. It seems to me that the bequest ought to be treated in the same way as if it had been a contingent legacy under the express terms of the will. It is a contingent legacy, there is a contingent liability to legacy duty, and provision must be made for dealing with that. In the present case there is no necessity to consider what ought to be done by splitting a part of the fund; the duty has become payable now and it must be paid out of the residuary estate.

PHILLIMORE L.J. I am of the same opinion. Taking first the question of estate duty, I think the law upon that is all to be found in the Act of 1910, treating the Act of 1910 as incorporating for this purpose a portion of the Act of 1896, adopting part, extending part, and curtailing part. This is shown by the joint operation of s. 63, s. 96, and the schedule; but it has been very much urged upon us by counsel for the appellant that we ought to look at this matter more historically and regard first the state of things before the Act of 1896, secondly under the Act of 1896, and thirdly under the Act of 1910. I agree with the Master of the Rolls in discarding altogether the consideration of statutory provisions before the Act of 1896. Those provisions may in a sense have given the idea that led to the clause in the Act of 1896, but they are very different and apply to very different circumstances. I will take the Act of 1896. What does that say? "Where any property passing on the death of a deceased person consists of" objects of a certain interest "and is settled so as to be enjoyed in kind in succession by different persons, such property shall not, on the death of such deceased person, be aggregated with other property, but shall form an estate by itself." Given conditions (*a*) that it is of a certain interest and (*b*) that it is settled so as to be enjoyed in kind in succession by different persons, the consequence is that it shall not be aggregated with the other property of the deceased, but shall form an estate by itself. Now proceed. There is a third condition (*c*) that something more shall happen: "and while enjoyed in kind by a person not competent to dispose of the same, be exempt from estate duty,"—when (*c*) ceases it is displaced—"but if it is sold or is in the possession of some person who is then competent to dispose of the same, shall become liable to estate duty." It seems to me that under this Act the aggregation takes place once and for all. The special property became an estate by itself, and then was subject to the later provisions of the first sub-section of s. 20, and the person disposing of it was subject to the provisions of sub-s. 2.

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(1) 90 L. T. 399.

(2) 29 Times L. R. 88.

Now I will look at what I conceive to be the law at this moment, consolidating, as it were, the two Acts in one, and I read the law as standing in this way: Where any property passing on the death of a deceased person consists of objects of a certain interest—I need not expand that—such property shall not on the death of such deceased person be aggregated with other property, but shall form an estate by itself, and while enjoyed in kind be exempt from legacy and succession as well as from estate duty; but if it is sold it shall then become liable to duty, but only in respect of the last death on which the property passed. That seems to me (not dealing with sub-s. 2, which is for this purpose unimportant) the complete law at this moment, and there I get exactly the same state of things: Where certain property satisfies condition (*a*) that it is of a certain interest, such property—I do not have (*b*) now; (*b*) has disappeared—shall not on the death of the deceased be aggregated with other property, but shall form an estate by itself, and, condition tion (*c*),—or, if you like, now condition (*b*)—while enjoyed in kind be exempt from legacy, succession, and estate duties. But if that condition ceases, or is defeated, if the property is sold, it ceases to be enjoyed in kind, and shall then become liable to duty. That seems to me to be quite plain and, if one may respectfully say so, quite reasonable. The effect of that is this, that the legatee of articles of this kind gets the advantage that he or she will not have to pay the legacy duty, or if, as it may be, it is under a settlement, succession duty, unless or until he or she sells. But, on the other hand, if and when he or she sells he or she will find that they are selling not only a specific chattel or specific chattels, but an hereditas,—an estate for this purpose, an estate separated by the Legislature from the rest of the estate of the testator or his predecessor—and that he or she is liable to estate duty as well as to legacy duty, of course always supposing that the testator has not provided for exemption from any particular duty. That being so, it seems to me that the learned judge's judgment upon this point was right.

With regard to the legacy duty, the duty which becomes payable either under s. 20 of the old Act when some person competent to dispose of the same gets possession of the property, or when it is sold before that, or when under the new Act it is sold, is none the less legacy duty because it is postponed duty and because it is a duty which only arises on a particular event or contingency. The Act speaks of it as the duty, and it seems to me that it is the same duty, though no doubt it will only come into operation under the present law by some act of volition of the legatee, or under the old law only after certain estates have ceased and somebody has become absolutely entitled by possession, or there has been some act of volition. There must be many similar instances of contingent legacies where the legacy will become absolute either by virtue of some act of volition of the legatee or, as in the case put by Sargant J. in the course of the argument, by some act of volition of a third person, for instance by the testator's widow marrying again; but nevertheless the legacy is given free of duty. When the contingency is fulfilled and the legatee comes into the legacy he is just as much entitled to have the duty paid out of the testator's general estate as if it had been an absolute legacy from the first.

Therefore I think that the learned judge's decision upon this point cannot be supported. No doubt he was influenced by the decision in the case of *In re Leconfield* (1), but I think that decision turns entirely upon the special words of the will, and is no authority upon the point which we are now considering. I agree with the Master of the Rolls that, so far as this point is concerned, the appeal should be allowed.

Sargant J. I am of the same opinion on both points. As regards the great bulk of the articles certified by the Treasury no actual possession was ever delivered to Lady Sackville, but by arrangement the property was transferred direct from the agents of the executors to her agent to be transferred on to the agent of the person to whom she had sold, and it is said that, that being so, there is not sufficient to bring into operation the provisions of s. 20 of the Act of 1896 as modified by s. 63 of the Act of 1910. Looking at those two sections together, it seems to me that the condition in s. 20 consisting in the words "and is settled so as to be enjoyed in kind in succession by different persons" may now be read as being in these modified terms: "and is given so as to be enjoyed in kind whether in succession by different persons through settlement or not." That being so, and the chattels having been given specifically to Lady Sackville, the Act prima facie applies, and there is to be no aggregation of this property with the other property of the deceased and it is to form an estate by itself.

But then it is said that the subsequent words of the section, "and while enjoyed in kind," are sufficient to postulate as a condition precedent to the whole operation of the section that there should have been some definite portion of time during which

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(1) 90 L. T. 399.

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enjoyment took place. In my opinion that is not so. I think these subsequent words merely afford a measure of the period during which the exemption, if any, is to take place, and do not imply that the general provisions of the section are conditional on there being any actual period of enjoyment or any corresponding period of exemption. That being so, it seems to me that s. 20, sub-s. 1, applies, and s. 20, sub-s. 2, also comes into operation, and the estate duty is affirmatively cast upon the person to whom the property comes. Counsel for the appellant has laid great stress on this, that unless the words of the amending Act are clear they should not be held to shift the incidence of the duty from one person to another; but to that, I think, there are two answers. In the first place the words do appear to me to be clear and definite. And in the second place I think it is rather misleading to look too closely at the incidence of the duty as between the different persons interested under the dispositions of the testator. Estate duty is a duty cast on the testator and his estate, and that, it seems to me, is what is being primarily regarded by the Legislature in the enactments in question.

As regards the second point, as to legacy duty, I think I need only add this. Under the special provisions of s. 63 of the Act the duty that is to become chargeable is in respect of the last death on which the property passes, which in this case is the same as the first death, and the provisions of s. 63 really seem to me to amount merely to a postponement of the legacy duty, which would otherwise, of course, have been payable, in default of provision in the will, by the legatee—a postponement of that duty until the actual sale takes place, and not the cancellation of the old duty and the substitution of an entirely new duty, which I think is the only principle on which it could be held that the legacy duty was not covered by the express terms of the will.

[There was a cross-appeal by the respondents against the second judgment of Neville J., the hearing of which was adjourned in order to give counsel an opportunity of considering the case of *O'Grady* v. *Wilmot* decided by the House of Lords [1916] 2 A. C. 231.]

Solicitors: *Meynell & Pemberton; Capron & Co.*

G. A. S.

In re WELLS AND HOPKINSON'S CONTRACT.

ASTBURY J.

1916

June 7.

[1916 W. 854.]

Trustee—Execution of Trusts—War Facilities—Delegation to Co-trustee —Execution of Trusts (*War Facilities*) *Act,* 1914 (5 *Geo.* 5, *c.* 13), *s.* 1 —*Execution of Trusts* (*War Facilities*) *Amendment Act,* 1915 (5 & 6 *Geo.* 5, *c.* 70), *ss.* 1, 2.

The Execution of Trusts (War Facilities) Acts, 1914 and 1915, do not enable one of several trustees to delegate the execution of the trust to a co-trustee.

VENDOR AND PURCHASER SUMMONS.

The trustees of a will, Charles and Francis, held a leasehold house on the trusts of the will. These trusts included a power of sale.

By a power of attorney dated July 8 and filed in the Central Office on July 13, 1915, Francis, who was serving with His Majesty's Forces, purporting to act in exercise of the power for that purpose given him by the Execution of Trusts (War Facilities) Act, 1914, appointed his co-trustee Charles his attorney to execute the trusts of the will during his period of war service and one month after, and to sell or otherwise dispose of any estates (including leasehold estates) vested in the trustees, and to execute all necessary deeds and instruments in that behalf.

In 1916, in pursuance of this power, the trustee Charles sold the leasehold house to the present vendor for 1200*l.* The assignment, dated March 1, 1916, purported to be made by both trustees, and was executed by Charles on his own behalf and as attorney for his co-trustee.

On April 3, 1916, the vendor agreed to sell the property to the present purchaser for 1600*l.*, and the purchaser paid 160*l.* deposit. On examining the title the purchaser objected that the appointment of a co-trustee as attorney to execute the trusts of the will was not authorized by the statute, and on April 19, 1916, he issued this summons for a declaration that a good title had not been shown and for return of the deposit.

W. R. Sheldon, for the purchaser. Sect. 1 of the Execution of Trusts (War Facilities) Act, 1914, which was passed on November 27, 1914, provides that a trustee (whether a sole trustee or a trustee with others) may, notwithstanding any rule of law or equity to the contrary, by power of attorney, delegate to "any person capable of being appointed to be a trustee of the trust" the execution during any period for which the trustee is engaged on war service, and a further period of one month, of any trust of which he is trustee. Now a co-trustee is not a person capable of being appointed to be a trustee and cannot therefore be a delegate. The section obviously assumes that, including the delegate, there shall be the same number of acting trustees as before. The delegation to a co-trustee virtually reduces the number.

As it was doubtful whether this Act applied to executors, the Execution of Trusts (War Facilities) Amendment Act, 1915, was passed on July 29, 1915. Sect. 2 declares that an executor or administrator of a deceased person is, in relation to the administration of the deceased's estate, a trustee within the meaning of the principal Act, and that he may appoint as his attorney his co-executor or co-administrator (if any), or any other person who would be capable of being appointed by a Court of competent jurisdiction to be administrator with the will annexed or administrator of such deceased person, if no executor or administrator existed. Now if the principal Act enabled a co-trustee to be appointed attorney, it would have been sufficient for the amending Act to declare that an executor or administrator was a trustee. The special declaration that he may appoint his co-executor or co-administrator would have been quite unnecessary, and its insertion is a strong indication that the principal Act did not authorize the appointment of a co-trustee. It was allowed in the case of executors because though in the case of personal estate one of several executors can act alone he cannot without the leave of the Court sell real estate alone: Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 2, sub-s. 2.

P. B. Lambert, for the vendor. The phrase "capable of being appointed to be a trustee of the trust" simply means a person fit to act as a trustee; and who can be more fit than an existing trustee who knows all the details of the trust?

Again, s. 1 of the amending Act provides that a tenant for life or a person having the powers of a tenant for life within the meaning of the Settled Land Acts shall be deemed to be a trustee within the meaning of the principal Act, and accordingly may delegate his statutory powers, provided that such delegation shall only be made to the Settled Land Act trustees "or to one or more of them." Now if the tenant for life were an infant the trustees would have his powers under the Settled Land Act, 1882 (45 & 46 Vict. c. 38), s. 60, and consequently could delegate them to one of themselves.

[Astbury J. The expression "a person having the powers of a tenant for life" refers to the limited owners under s. 58. Sect. 60 does not constitute the trustees such limited owners. It merely enables them to exercise the infant's powers on his behalf.]

If that is so, there is no one who can delegate in the case of an infant tenant for life.

Again, s. 2 of the amending Act is merely declaratory. Assuming that a trustee could delegate to his co-trustee, it declares that an executor is a trustee and that he may appoint his co-executor as attorney. The latter declaration is merely consequential on the former. The section was not only necessary for real estate purposes, but also for transfers of registered stock: *Barton* v. *North Staffordshire Ry. Co.* (1)

W. R. Sheldon in reply. Even if s. 1 of the amending Act coupled with s. 60 of the Settled Land Act, 1882, has the effect of enabling the trustees of an infant life tenant to delegate his powers to one of themselves, it does not enable them to delegate their own powers to each other. The section throws no light on the present point.

Astbury J. (after stating the facts). The purchaser contends that s. 1 of the principal Act does not enable one of two trustees to delegate his powers to his co-trustee. In other words, he contends that the expression "any person capable of being appointed to be a trustee of the trust" does not apply to a person already a trustee and therefore incapable of being appointed to an office that he already holds. On the language of the section I think, on the whole, that the purchaser's contention is well founded. The purchaser also submits that this may have been the direct intention of the Legislature, as the section is only dealing with the machinery for the execution of the trust, and not with the policy of the law in regard to keeping up the same number of trustees. It is true that a sole trustee may delegate his trust, but I do not think that one of two trustees can delegate the trust to his co-trustee, thereby in effect reducing the number of trustees to one.

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(1) (1888) 38 Ch. D. 458.

The vendor suggests that s. 1 of the amending Act shows that if the life tenant were an infant the Settled Land Act trustees, acting under s. 60 of the Settled Land Act, 1882, could appoint one of themselves to exercise his powers. Whether that is so or not, it does not throw any light on the principal Act, and I do not think it is the effect of the section.

The vendor also relies on s. 2 of the amending Act. But if it throws any light at all on the construction of the principal Act it is in favour of the purchaser's contention. One of two trustees cannot act alone; but one of two executors may for many purposes act alone, though he cannot transfer real estate: Land Transfer Act, 1897, s. 2, sub-s. 2. Now s. 2 of the amending Act declares that an executor is a trustee within the meaning of the principal Act, and goes on to declare that he may appoint his co-executor as his attorney. But if the principal Act already enabled a trustee to appoint his co-trustee as attorney, the declaration that an executor was a trustee would have been sufficient, and it would have been unnecessary to go on to declare that he might appoint his co-executor.

For these reasons, and giving the Acts the best attention I can, I hold that the purchaser is right in his contention, and that one trustee cannot delegate the execution of the trust to his co-trustee. There will be a declaration that the vendor has not shown a good title, and an order for return of the deposit.

Solicitors: *Torr & Co.*; *Petch & Co.*

G. R. A

MACKERETH *v.* WIGAN COAL AND IRON COMPANY, LIMITED.

PETERSON
J.

1916

April 18, 19
May 17.

[1914 M. 1007.]

Company—Partly-paid Shares—Executors and Trustees—Indebtedness of Holder—Recognition of Trust—Lien—Articles of Association—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 27.

Articles of association of the defendant company provided: "9. No person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share, or (except only as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder thereof." "12. The company shall have a first and paramount lien and charge on all the shares (not being fully paid up shares) registered in the name of a member (whether solely or jointly with others) for all moneys due to the company from him or his estate, either alone or jointly with any other person, whether a member or not, and whether such moneys are presently payable or not":—

Held, that s. 27 of the Companies (Consolidation) Act, 1908, and article 9 (above) do not protect a company which in the face of notice that a shareholder is not the beneficial owner of the shares makes advances or gives credit to the shareholder.

In July, 1904, an owner and registered holder of 990 shares, partly paid up, in the defendant company died, having by his will settled his residuary estate on trust for his widow and children. The plaintiffs and the widow and a son, James Hodgson, were his executors and trustees. The probate was sent to the company for registration, and the secretary, in returning it, drew attention to the articles of association, under which executors might be registered either themselves or through a nominee. They elected to be, and in due course were, registered themselves. In 1905 they sold 355 of the shares. In October of that year the plaintiff Mackereth, on behalf of a bank of which he was manager, gave notice to the company that 370 of the shares "of which the executors are the registered proprietors" had been deposited with the bank as security for money due or to become due to the bank. The secretary, in acknowledging the notice, drew attention to article 9 (stated above). In 1907 the widow died and the 635 shares were registered in the names of the three remaining executors, and the company's attention was again drawn to the fact that the shares were held by them as executors. In January, 1910, James Hodgson, on the advice of the executors' solicitors, wrote to the company asking for the certificate of 200 of the shares which had been deposited by the testator with the company as security and had been retained by the company, and the secretary forwarded it to him for the trustees, saying no doubt it ought to be in their keeping. At the same time James Hodgson, who had been appointed one of the company's agents, gave the company a bond to secure any future indebtedness from him as agent. Early in 1912 James Hodgson, being indebted to the company, charged his interest in the testator's estate in favour of the company. The company's solicitors gave notice to each of the plaintiffs "as one of the trustees of the testator's will" that he had done so. At that time the company did not appear to think it had any lien on the shares standing in the executors' names for James Hodgson's debt, but in August—having in July obtained judgment against him—claimed to retain the dividends by virtue of article 12 (stated above), and in February, 1913, again retained the dividends. In May, 1913, the company registered a transfer to a nominee of the bank of the 370 shares charged to the bank, but continued to assert a lien for James Hodgson's indebtedness on the remaining 265 shares, and in June, 1913, sold those shares and applied the proceeds in reduction of James Hodgson's debt. In March, 1914, James Hodgson ceased to be a trustee. In an action against the company for wrongful dealing with the shares and dividends:—

Held, that the company was wrong in asserting a lien against the beneficial owners of the shares and must account for the proceeds of sale and for the dividends which had been applied towards the satisfaction of James Hodgson's indebtedness.

Rearden v. *Provincial Bank of Ireland* [1896] 1 I. R. 532 approved and followed.

WITNESS ACTION.

The facts were stated by Peterson J. as follows:—

"James Hodgson died on July 6, 1904, being then the owner and registered holder of 990 partly-paid shares in the defendant company. The certificate of 200 of these shares had by arrangement between him and the company been retained by the company as security for anything that might be due to the company from him as one of the company's agents. He left a will, by which he appointed the present plaintiffs and his widow, Margaret Hodgson, and a son, James Hodgson, his executors and trustees, and settled his residuary estate on trust for his widow and children. The will was proved by all the executors. On November 22, 1904, the solicitors of the executors sent the probate to the company for registration, and stated in their letter of that date that the executors were the four persons whom I have mentioned. The secretary of the company, in his letter of November 24, 1904, returned the probate, stating it had been noted in the books of the company, and called the attention of the executors to the articles of the company relating to the transmission of shares under which the executors might elect either to be registered themselves as the holders of the shares, or to have a nominee registered as the holder. The executors elected to be registered as the holders of the shares, and on November 29, 1904, in a letter headed 'James Hodgson, Deceased,' their solicitors enclosed three forms signed by the executors as executors of the testator's will, by which they expressed their election to be registered, and also an authority to the company to pay the dividends to two of themselves, namely, James Hodgson, the son, and Edmund Mackereth, who was a bank manager. And on January 18, 1905, the secretary wrote to the solicitors that the shares had been registered accordingly.

"In the year 1905 the executors sold 355 of the shares, leaving 635 shares standing in their names. On October 10, 1905, Mr. Mackereth, on behalf of the London City and Midland Bank, gave notice to the company that the certificates of 370 of the shares of which the executors of the late Mr. James Hodgson, deceased, were the registered proprietors had been deposited with the bank as security. On October 11, 1905, the secretary acknowledged the receipt of this notice, and called attention to article 9, which I shall have to consider later on. (1) In 1907 Mrs. Margaret Hodgson, the widow and one of the executors, died, and the shares were then registered in the names of the three remaining executors. In the course of the registration of the shares in the names of the three survivors the company's attention was, by a letter of July 10, 1907, again called to the fact that the shares were held by them as executors of the late James Hodgson, deceased.

(1) Articles of association: "9. No person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share, or (except only as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder thereof."

"After the testator's death James Hodgson, the son, was appointed by the company one of its agents. The company up to 1910 retained the certificate for the 200 shares which had been deposited with them by the testator as security for any sum which he, the testator, might owe to the company. The executors' solicitors pointed out in 1910 that the trustees ought not to leave these certificates with the company, and accordingly on January 18, 1910, James Hodgson, the son, wrote to the company a letter in which he stated that the trustees under his late father's will had been advised by the solicitors that they must ask the company for this certificate, and offered to give 'one of the usual guarantees' as security for any sum which might become due from him, the son, as one of the company's agents. On January 20, 1910, Mr. Hewlett, for the company, replied that no doubt the certificate should be in the possession of the trustees of the testator, and forwarded it to James Hodgson, the son, for the trustees, and that gentleman gave to the company a fidelity bond to secure any future indebtedness from him as agent of the company.

"The next event of importance took place in 1912. It was agreed by counsel that from January, 1912, to July, 1912, when the company obtained judgment against James Hodgson, the son, that gentleman was indebted to the company. There is no evidence that he owed the company any money before January, 1912. In the spring of 1912 James Hodgson charged his interest in the testator's estate in favour of the company, and the company's solicitors on April 15, 1912, gave a separate notice to each of the plaintiffs, 'as one of the trustees of the testator's will,' that James Hodgson had charged his interest in the reversionary estate of the deceased in favour of the company, and on April 17, 1912, wrote to each of the plaintiffs that James Hodgson had informed them that the only charge prior to that in favour of the company upon his interest in his late father's estate was one for 500*l.*, and observed that if that was the case no reply was necessary. The plaintiffs, not knowing of any other charge, adopted this suggestion and did not reply. It is obvious that at this time the company did not think that it had any lien on the shares standing in the names of the executors for Mr. James Hodgson's debt, for, if the company was entitled to that lien, the trustees and the other beneficiaries would have a claim against James Hodgson's interest in the rest of the testator's estate in order to make good the amount which had been taken from the estate to answer James Hodgson's debt to the company. However, on August 10, 1912, the solicitors for the company claimed to retain the dividends on the shares standing in the executors' names towards satisfaction of James Hodgson's debt to the company by virtue of the lien conferred by the articles of association. (1) In February, 1913, the company retained another dividend on these shares. In May, 1913, the company, after some controversy with the bank, in which the company claimed that it had a lien which was paramount to the bank's charge, registered a transfer of the 370 shares charged to the bank, in the name of the bank's nominee, but the company continued to assert its lien for James Hodgson's indebtedness on the remaining 265 shares, and in June, 1913, sold those shares and applied the proceeds of sale in reduction of the amount due to the company from James Hodgson."

The plaintiffs (James Hodgson having ceased to be a trustee in March, 1914) brought this action against the company for wrongfully dealing with the shares and dividends, and for damages.

Tomlin, K.C., and *Cassie Holden*, for the plaintiffs. The question is whether the defendant company was entitled to enforce a lien against shares standing in the names of trustees, whose fiduciary position was known to the company, in respect of a personal debt due to the company by one of them. The object of s. 27 of the Companies (Consolidation) Act, 1908 (2), which reproduces s. 30 of the Companies Act, 1862, is to relieve the company from taking notice of equitable interests in shares and to preclude persons claiming under equitable titles from converting the company into a trustee for them: Buckley on the Companies Acts, 9th ed. p. 75.

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(1) Article 12: "The company shall have a first and paramount lien and charge on all the shares (not being fully paid up shares) registered in the name of a member (whether solely or jointly with others) for all moneys due to the company for him or his estate, either alone or jointly with any other person, whether a member or not, and whether such moneys are presently payable or not."

(2) Companies (Consolidation) Act, 1908, s. 27: "No notice of any trust, expressed, implied, or constructive, shall be entered on the register, or be receivable by the registrar, in the case of companies registered in England or Ireland."

That section and articles of association similar to the articles of this company material to this case have been the subject of legal decisions, and the result of those decisions is that in disputes between third parties as to their rights inter se to shares a company is not to be put in any worse position by reason of the fiduciary character of the registered holders, but in disputes between the company and other persons the company is subject to the ordinary rules of law and equity: *Société Générale de Paris* v. *Walker* (1); *Bradford Banking Co.* v. *Briggs & Co.* (2); *In re Perkins* (3); *Rainford* v. *James Keith & Blackman Co.* (4) The section and the articles have for their scope the regulation of the rights and duties of the company, but they have no connection with or reference to ordinary trading debts. In the present case the debt was incurred after the company had notice that the shares were held by executors and trustees, and that distinguishes this case from *New London and Brazilian Bank* v. *Brocklebank* (5), where trustees were registered holders and it was held that the company's lien for a debt due from one of the trustees to the company prevailed over the title of the cestuis que trust of the shares. But it has been held by the Irish Courts in *Rearden* v. *Provincial Bank of Ireland* (6) that where the company has notice that the registered holder holds as trustee the lien of the company will not prevail over the title of the cestui que trust. The principle of *Bradford Banking Co.* v. *Briggs & Co.* (2) was correctly applied in that case, and the decision is directly applicable here. It is not sought to affect the defendant company with a trust, but when the company gave credit to James Hodgson in the course of ordinary trading it knew that these shares were not his property, and it cannot in good conscience pay his personal debt out of it. *Simpson* v. *Molson's Bank* (7) was an entirely different case from this, and turned on the question whether the company had notice and was bound to see to the execution of specific trusts.

Hughes, K.C., and *G. M. Hildyard* (for *Lloyd-Greame*, serving with His Majesty's Forces), for the company. The question is really one of contract between the company and the shareholder, not one of notice. The bargain between the company and the shareholder was that the company should have a lien, and the cestui que trust cannot repudiate the terms on which the shares are held or claim the beneficial interest without complying with the contract: *New London and Brazilian Bank* v. *Brocklebank* (1); *Borland's Trustee* v. *Steel Brothers & Co.* (2); Palmer's Company Precedents, 11th ed. pt. 1, p. 662.

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(1) (1885) 11 App. Cas. 20.
(2) (1886) 12 App. Cas. 29.
(3) (1890) 24 Q. B. D. 613.
(4) [1905] 2 Ch. 147.
(5) (1882) 21 Ch. D. 302.
(6) [1896] 1 I. R. 532.
(7) [1895] A. C. 270.

As to notice, if that is material, there was no official notice, no notice such as the law would require. Sending the probate of the will to the company was not notice: *Grundy* v. *Briggs* (3); nor was the executors' expression of their wish to be registered, nor the request for the certificate of the 200 shares. The delivery of the certificate by the company to the trustees was not waiver of the right to a lien. According to the true and proper construction of s. 27 and the company's articles there was no obligation on the company to accept, or preserve any record of, notices of equitable interests or trusts, and any such notice would be inoperative to affect the company with any trust: *Société Générale de Paris* v. *Walker* (4); *Bradford Banking Co.* v. *Briggs & Co.* (5); *In re Perkins.* (6) The company had no notice in 1912, when James Hodgson's liability was incurred, that there was any reason why he should not be subject to the provisions of article 12. The reasoning of the judges in *Rearden* v. *Provincial Bank of Ireland* (7) is not sound, and in any case this Court is not bound to follow the Irish decision.

As to the dividends, a lien on shares gives a lien on the dividends: *Hague* v. *Dandeson.* (8)

Tomlin, K.C., in reply. The company had from the beginning, as the result of letters and other documents, knowledge that the shares were part of a trust fund which formed the estate of the testator. Having knowledge of a trust, knowledge of the shareholder's fiduciary capacity is immaterial. According to the Privy Council in *Simpson* v. *Molson's Bank* (9), the examination of the will involved notice of the fiduciary capacity. As to the contract

(1) 21 Ch. D. 302.
(2) [1901] 1 Ch. 279.
(3) [1910] 1 Ch. 444.
(4) 11 App. Cas. 20.
(5) 12 App. Cas. 29.
(6) 24 Q. B. D. 613.
(7) [1896] 1 I. R. 532.
(8) (1848) 2 Ex. 741.
(9) [1895] A. C. 270.

between the company and its shareholders, though it is impossible to turn the company into a trustee of the shares, yet, when it is a question of the rights of the company and the company is a mortgagee, the company is not put in a position outside the general law as expressed in *Hopkinson* v. *Rolt*. (1)

Cur. adv. vult.

May 17. PETERSON J., after stating the facts as above. The question is whether the company acted wrongfully in retaining these dividends and selling the 265 shares and appropriating the money so received to James Hodgson's indebtedness. The answer to that question depends on two questions—(1.) whether the company had notice that the shares were held in trust for others, and, if so, (2.) what is the effect of s. 27 of the Companies Act, 1908, and articles 9 and 12 of the articles of association of the company.

There is not, I think, any evidence that the company before April, 1912, when James Hodgson gave a charge to the company on his interest in his father's estate, had knowledge or notice who were the persons beneficially interested in the shares in question: see *Grundy* v. *Briggs*. (2) It had, however, complete information that the shares were in the first instance held by the plaintiffs and James Hodgson and the testator's widow as executors of the testator, and it had notice in January, 1910, that the shares were held by the plaintiffs and James Hodgson as trustees of the testator's will. The company therefore had notice that these shares were held by those three gentlemen as trustees for the persons who were interested in them under the testator's will, and, if that is material, there is no evidence that that fact had in 1912, when James Hodgson's liability was incurred, escaped the memory of the company's officers. If a private person who had received a notice of this description took a charge on a trust estate from the trustee as security for a debt of the trustee he would take with notice of a breach of trust, and could not set up the charge against the beneficiaries.

But the question then is whether the company, having regard to s. 27 of the Companies (Consolidation) Act, 1908, and the 9th and 12th articles of the articles of association, is in a better position, so that it can say that, notwithstanding the notice that

(1) (1861) 9 H. L. C. 514. (2) [1910] 1 Ch. 444, 449.

the shares were in fact held in trust, it is able to assert against the beneficiaries a lien or charge on the shares for the private debt of one of the trustees. On this question I am not without guidance. The precise point was determined in favour of the persons beneficially entitled and against the company claiming the lien in *Rearden* v. *Provincial Bank of Ireland* (1), in the first instance by the Master of the Rolls and finally by the Court of Appeal. This decision is not binding upon me, and I have to form my own opinion, based on other decisions by Courts in this country, and assisted in arriving at a conclusion by the reasoning of the learned judges in the Irish Courts. For the company it was argued that under s. 27 of the Act of 1908, and the articles of association, no notice of any equitable interest or trust can affect the company in any way, and that, as the notice of the trust in the present case, which the company in fact received, must be treated as non-existent, or at least ineffectual, the lien which is conferred by the articles is operative. The argument leads far; for it would follow that, if a trustee of shares in a company informed the company that he held the shares for the benefit of other persons, and that he had not as against his cestui que trust any power of mortgaging them for his own benefit, he could yet effectually charge them to the company as security for money lent to him by the company. It was urged that article 9 of the articles of association is wider in its scope than s. 27 of the Act of 1908. Now it was pointed out by Fry L.J. in *Bradford Banking Co.* v. *Briggs & Co.* (2) that that section implies and involves that the company is not to be affected with notice of any trust; and I agree with the opinion of Palles C.B. in *Rearden* v. *Provincial Bank of Ireland* (1) that the present article 9 in effect amounts to a provision that no notice of any trust shall be recognized by or shall bind the company. That being so, decisions relating to the effect of s. 27 of the Act have a material bearing on the question what are the scope and effect of article 9. In several cases it has been stated in broad terms that a company "need not take notice in any way of trusts": per Brett M.R. in *Société Générale de Paris* v. *Tramways Union Co.* (3); or that any notice is absolutely inoperative to affect a company with any notice:

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(1) [1896] 1 I. R. 532.
(2) (1885) 31 Ch. D. 19, 28.
(3) (1884) 14 Q. B. D. 424, 439.

per Lord Selborne in the same case in the House of Lords—*Société Générale de Paris* v. *Walker.* (1) These observations had, however, reference to the obligation of the company to register transfers of shares. So too in *In re Perkins* (2) Lord Coleridge C.J. said that companies have nothing whatever to do with the relations between trustees and a cestui que trust in respect of the shares of the company; but the question there was whether a cestui que trust of shares was a person entitled thereto as against the company, and it was held that the company had not a lien on the shares for the debt of the cestui que trust. If the passages in the judgments to which I have referred were intended to be of universal application, they are not in accordance with the judgments of the House of Lords in *Bradford Banking Co.* v. *Briggs & Co.* (3) In that case the respondent company claimed that by virtue of s. 30 of the Companies Act, 1862, it could, under an article corresponding to article 12 in the present case, assert as against the appellant bank a lien for moneys which became due to the company from one of its shareholders after the company had received notice from the bank that the certificates for the shares, on which the lien was asserted, had been deposited with the bank by the shareholder as security for sums due to the bank, and that *Hopkinson* v. *Rolt* (4) had not, in the circumstances, any operation. This contention was upheld by the Court of Appeal (5), whose decision was, however, reversed in the House of Lords. Lord Blackburn, in whose judgment the Lord Chancellor (Lord Halsbury) concurred, took the view that the company had such knowledge that the shareholder had ceased to be the owner of the shares as would have made it unjust to allow him credit on the faith of the shares, and that the bank were not seeking to affect the company with a trust, but only to affect it as a trader with the knowledge of the bank's interest; and Lord FitzGerald held that, while the notice might not have affected the company with any trust in favour of the bank, it was a valid and operative intimation to the company that the beneficial interest of the shareholder had been pledged to the bank. The effect of this decision is briefly stated by Stirling L.J. in *Rainford* v. *James*

(1) 11 App. Cas. 20, 30.
(2) 24 Q. B. D. 613, 616.
(3) 12 App. Cas. 29.
(4) 9 H. L. C. 514.
(5) 31 Ch. D. 19.

PETERSON J.

1916

MACKERETH v. WIGAN COAL AND IRON COMPANY, LIMITED.

Keith & Blackman Co. (1) in these words: "Where the company in which the shares are held sees fit to deal with the shares for its own benefit, then that company is liable to be affected with notice of the interest of a third party."

I am therefore of opinion that s. 27 of the Act of 1908 and article 9 of the articles of association do not protect a company which, in the face of notice that the shareholder is not the beneficial owner of the shares, makes advances or gives credit to the shareholder, and that the decision in *Rearden* v. *Provincial Bank of Ireland* (2) was right. The result is that the company in the present case was wrong in asserting a lien against the beneficiaries, and must account for the proceeds of sale of the shares, and for the dividends which it has applied towards the satisfaction of the indebtedness of James Hodgson, junior.

Solicitors for plaintiffs: *Williamson, Hill & Co., for Martin & Atkinson, Ulverston.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Peace & Ellis, Wigan.*

(1) [1905] 2 Ch. 147, 161.

(2) [1896] 1 I. R. 532.

A. L.

EVE J.

1916

May 30;
June 7.

In re BORWICK'S SETTLEMENT.

WOODMAN *v.* BORWICK.

In re WOODMAN (AN INFANT).

[1915 B. 2249.]

Settlement—Construction—Infant—Maintenance—Clause limiting Trustees' Discretion—Father's Rights—Repugnancy—Public Policy.

Under a voluntary settlement an infant was entitled to a share of 10,000*l.* stock in a limited company after the death of his mother, a daughter of the settlor, and also to further parts of settled stock contingently on his attaining twenty-one. The trustees of the settlement were empowered by clause 6 at their discretion to apply any part of the income of the 10,000*l.*, not exceeding 500*l.* a year, for the maintenance, education, and advancement or otherwise for the benefit of the infant, but by clause 9 no part of the income was to be applied for the maintenance, education, or otherwise for the benefit of the infant whilst he should be "in the custody or control" of his father, or his father should "have anything to do with his education or bringing up." The father had no income beyond his captain's pay in the Army and did not wish to give up the custody or control of the infant and his education. Nothing was alleged against his fitness to have the custody of his child.

Upon an application by the infant to obtain an allowance for maintenance:—

Held, that the condition affecting the father of the infant was not repugnant to the interest given by the settlement or contrary to public policy, and the trustees had therefore no discretionary powers of maintenance which they could exercise in the infant's favour.

ADJOURNED SUMMONS.

This was a summons by John Geoffrey Wootton Woodman, an infant nine years of age, suing by Captain Leonard Cecil Woodman, his father and next friend, asking that the sum of 300*l.* a year might be allowed for the maintenance and education of the infant as from April 2, 1915, and during his minority, or until further order, and that such allowance might be paid to his father as guardian by the trustees for the time being of a voluntary settlement.

By this voluntary settlement by deed poll made by the respondent, Sir Robert Hudson Borwick, on August 31, 1910, a sum of 70,000*l.* ordinary stock in Arthur Guinness, Son & Co., Limited, was settled upon trust whereby 10,000*l.*, part thereof, was appropriated for the infant's mother, a daughter of the settlor, for her life, and under which the infant was now entitled to a distributive share of the 10,000*l.* so appropriated, and of three other sums of 10,000*l.*, further parts of the settled stock, contingently on his attaining twenty-one. And subject to certain provisions contained in clause 9 of the deed the trustees were empowered by clause 6 at their discretion to apply the whole or any part, not exceeding 500*l.* per annum, of the income of the 10,000*l.* for the maintenance, education, advancement, or for travelling expenses, or otherwise for the benefit of the infant, and so that the trustees might either apply the same themselves or pay it to the guardian of the infant. The material provisions in clause 9 were that no part of the income was to be paid or applied for the maintenance and education or otherwise for the benefit of the infant "whilst he should be in the custody or control" of his father, or his father should "have anything to do with the education or bringing up" of the infant.

Captain L. C. Woodman married Mary Dorothea Borwick, a daughter of Sir R. H. Borwick, on February 8, 1904, and the infant plaintiff was the only child of the marriage and was born on March 23, 1907. His mother died on April 2, 1915. The father had no income except his captain's pay of 340*l.* per annum, and he did not wish to relinquish the custody or control of the infant, or to abandon his duty as a father to watch over the education and bringing up of his son. The trustees of the settlement were willing, if they had the power, to apply a proper sum out of the income of the trust fund towards the maintenance, education, or benefit of the infant plaintiff, but were unwilling that such sums or any part thereof should be paid to the infant's father. The present income of the trust fund was about 1400*l.* per annum. The defendants were the trustees of the settlement and an infant beneficiary.

Maugham, K.C., and *Dighton Pollock,* for the infant. The effect of clause 9 of the settlement is to offer an inducement to the father to neglect his parental duties. It is therefore void as repugnant to the interest given by the settlement. Sect. 43 of the Conveyancing and Law of Property Act, 1881, does not apply because expressly excluded here. The clause is also against public policy. The duty of a father is to support and control his son: *Swift* v. *Swift* (1); *In re Besant* (2); *In re Andrews.* (3) A father cannot contract to abandon his duties, or abdicate the right of custody and control of his child, and the draftsman of this settlement was aiming at something which the Courts will not allow.

There appears to be no case precisely in point, but similar questions have arisen in separation cases: *Cartwright* v. *Cartwright.* (4) [They also referred to Simpson on Infants, 3rd ed. p. 138, *Wilkinson* v. *Wilkinson* (5), and *Morley* v. *Rennoldson.* (6)] The condition may also be said to be void for uncertainty.

Clayton, K.C., and *P. F. S. Stokes,* for the trustees of the settlement. We support the provisions of the settlement and say that maintenance cannot be allowed having regard to the condition in clause 9. The provision was voluntary and was to be applied so long as a certain state of things happened. The maintenance cannot be taken without the condition: *Blake* v. *Leigh* (7); *Colston* v. *Morris* (8); *Lyons* v. *Blenkin* (9); *Powel* v. *Cleaver* (10); *Eyre* v. *Countess of Shaftesbury* (11); White and Tudor's Leading Cases in Equity, 8th ed. vol. i. pp. 495, 519.

C. J. W. Farwell, for an infant respondent. I support the contention of the trustees. It is not a question of the father abandoning his rights over his child, but of fulfilling the condition imposed by the settlement. The father now seeks to get the benefit without the burden and to take the maintenance for his son without fulfilling the condition. It is a perfectly good provision which the Court will enforce.

Maugham, K.C., in reply.

Cur. adv. vult.

June 7. EVE J. This summons, by which the applicant, an infant nine years old, suing by his father as his next friend, seeks to obtain an allowance for maintenance and education out of the income of a fund to a share of which he is entitled contingently on his attaining twenty-one, involves a somewhat unusual question of construction. The question is not in terms raised by the summons, but all persons interested in its determination are represented by the parties before the Court, and no objection is made to my dealing with it in these proceedings. The matter in difference arises in the following circumstances: [His Lordship stated the terms of the settlement and continued :]

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(1) (1865) 34 Beav. 266.
(2) (1879) 11 Ch. D. 508.
(3) (1873) L. R. 8 Q. B. 153.
(4) (1853) 3 D. M. & G. 982.
(5) (1871) L. R. 12 Eq. 604.
(6) [1895] 1 Ch. 449.
(7) (1756) Amb. 306.
(8) (1821) Jac. 257, note (*a*).
(9) (1821) Jac. 245.
(10) (1789) 2 Bro. C. C. 499.
(11) (1722) 2 P. Wms. 103.

I think the effect of the latter of the provisions in clause 9 is to exclude the father from all power of interference with or management of the infant's education and upbringing, but not to deprive him of access to and intercourse with the infant. But the former provision in that clause could not, in my opinion, be complied with except by a complete abandonment of all parental control over the infant. The mere surrender of the custody would not suffice, for the father would not thereby part with control, and he might at any time assert his right to resume the custody. The father, whose means are limited to his pay as a captain in the Army, and against whose fitness to have the custody not a word has been said, not unnaturally declines to relinquish his parental rights or to abandon his parental duties, and in these circumstances the trustees, who are prepared to exercise their discretion if they can do so, are advised that they have no power to apply any part of the income for the infant's maintenance, education, or benefit. The infant contends that the provisions by which the exercise of the discretion purports to be controlled are void as being repugnant to the interest given to him by the settlement and contrary to public policy. I cannot hold there is any such repugnancy as is suggested. Seeing that it was competent for the settlor by express provision in the settlement wholly to suspend the exercise of the statutory powers of maintenance contained in s. 43 of the Conveyancing and Law of Property Act, 1881, I do not think any provision operating as a conditional or partial suspension can consistently be regarded as repugnant, and on that point I decide against the infant's contention.

Then comes the question whether the provision which, in substance, puts the father to his election whether he shall forego his parental rights and duties and obtain for the infant the means for a public school education, or whether he shall forfeit these advantages and retain his parental privileges and obligations, is contrary to public policy and on that ground to be treated as void and of no effect. Upon this it is to be observed that the benefit and condition do not affect the same person; the benefit goes to the infant, the condition is imposed on the father; and although it may well be that in a gift to A. B. conditional upon his doing something contrary to public morality, the condition can be disregarded as being contrary to public policy—see *Wilkinson* v. *Wilkinson* (1)—it does not at all follow that the same consequences result in the case of a gift to A. B. so long as C. D. shall be doing something contrary to public morals. Indeed, in many cases the very existence of the condition contra bonos mores may be the incentive of the gift, as, for example, a gift for the maintenance of the children of a married woman if and as long as she is living apart from her husband—a gift to which I apprehend no objection could be maintained on the ground of its being contrary to public policy. If to these observations it is objected that the provision of maintenance for an infant is a benefit to the parent, sometimes direct and always indirect, there are, I think, two answers that can be made—the one present in but not peculiar to this case, that there is an express provision in the settlement that no part of the income is to be paid to the father which precludes the possibility of a direct benefit, and the other of more general application, that in exercising their discretion it is the duty of the trustees to realize that the infant and not the parent is the real object of the settlor's bounty; and if in exercising their discretion on these lines the parent is benefited, as, indeed, may be many others who share in the moneys expended in maintenance and education, this is not due to any intention on the part of the settlor to benefit the parent or such other persons, but follows from the relationship in which they stand towards the infant beneficiary.

The result is that, notwithstanding the attractive manner in which the argument on behalf of the infant was presented to the Court, I cannot bring myself to assent to its conclusions. Were I to do so, I think I should be stretching the doctrine of public policy beyond reasonable limits and be establishing a dangerous and unsound precedent. I therefore hold that in the existing circum-

(1) L. R. 12 Eq. 604.

stances the trustees have no discretionary powers of maintenance which they can exercise in the infant's favour.

EVE J.
1916
BORWICK'S SETTLEMENT, *In re.*
WOODMAN *v.* BORWICK.
WOODMAN, *In re.*

The summons must be amended by including the question as to the construction of the deed, and the order will determine this point and direct that the costs of all parties be taxed as between solicitor and client and be paid and retained out of the income of the 10,000*l.*

Solicitors for applicant: *Guscotte, Wadham, Tickell & Co.*
Solicitors for respondents: *Charles Russell & Co.*

G. M.

In re R. S. NEWMAN, LIMITED.
RAPHAEL'S CLAIM.

[00320 of 1915.]

C. A.
1916
ASTBURY J.
May 16.
C. A.
June 26.

Company—Winding up—Proof—Managing Director—Appointment for One Year certain—Salary and Commission—Loss of Salary—Loss of Prospective Commission—Loss of Option to take up Shares and hold Salaried Office for Ten Years—Implied Condition as to Exercise of Option.

By an agreement dated July 20, 1915, the above company and the three life directors who held all the issued capital appointed the applicant managing director for one year as from July 1, 1915, at a salary of 5*l.* a week and a commission of 5 per cent. on the amount realized from and paid upon all sales effected of the company's goods. By clause 5 the company and the three directors granted the applicant the right, on applying to the company therefor and paying for the same at par within one year from July 1, 1915, to acquire from the company shares equal to one third of the share capital issued at that date, and the directors undertook to procure an allotment accordingly. It was provided that if and when the applicant acquired the shares his commission should cease, but his employment should continue for ten years from July 1, 1915, at 5*l.* a week. He was not to part with the shares within the ten years without the written consent of the three directors.

On November 16, 1915, a compulsory winding up order was made before the applicant had exercised his option under clause 5.

On December 3, 1915, the applicant obtained employment with one of the directors who continued to carry on a similar business.

He was engaged at 5*l.* a week without commission and subject to a week's notice.

On January 22, 1916, the applicant sent in a proof claiming :—

(*a*) Arrears of salary and commission up to the winding up ;

(*b*) Damages for loss of salary from the winding up to June 30, 1916 ;

(*c*) Damages for loss of commission during the same period ;

(*d*) Damages for loss of his option to take up shares and obtain a ten years' appointment.

On April 13, 1916, the liquidator admitted the proof (*a*) as to arrears of salary and commission up to the winding up, and (*b*) as to salary up to the date that the applicant obtained his new employment. He rejected the rest of the proof.

On May 3, 1916, the applicant appealed and claimed to have the proof allowed in full.

At the hearing on May 16, 1916, the applicant admitted that his present employment, though throughout precarious, would in all probability continue till June 30, 1916, but contended that the damages ought to be assessed as at the date of the breach of contract having regard to the then probability of his obtaining full employment for the term :—

Held by Astbury J., that, in the circumstances, the applicant had not proved any damages for loss of salary under head (*b*) beyond what the liquidator had allowed.

Held by Astbury J. and the Court of Appeal, that the claim for damages for loss of commission under head (*c*) was not maintainable.

Ex parte Maclure (1870) L. R. 5 Ch. 737 ; *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (1876) L. R. 3 Ind. Ap. 200 ; and *Hamlyn* v. *Wood* [1891] 2 Q. B. 488 applied.

Turner v. *Goldsmith* [1891] 1 Q. B. 544 distinguished.

Held, also, by Astbury J., that clause 5 implied that any application for shares thereunder must be made while the company was in existence (see *Taylor* v. *Caldwell* (1863) 3 B. & S. 826), and as the applicant had not fulfilled the condition precedent to obtaining a ten years' appointment, he was not entitled to damages under head (*d*).

SUMMONS.

The above private company was incorporated on July 13, 1915, to carry on the business of optical and scientific instrument manufacturers and dealers. The nominal capital was 2000*l.* in 1*l.* shares, of which 1189 were issued and fully paid. These shares were held in equal thirds by the three directors Rosa Neumann, Jessie Mitchell, and Joseph McKim, who were life directors under art. 72 and managing directors for ten years under art. 85.

By an agreement dated July 20, 1915, and made between the company, the three directors, and the applicant Raphael, it was agreed as follows :—

By clause 1 the company appointed the applicant managing director for one year as from July 1, 1915, and if at the expiration of that period the parties should be willing to prolong the same the said employment should continue for a further period of three years.

Clause 2 provided that there should be paid to the applicant "by way of salary the sum of 5*l.* per week and a commission of 5 per cent. on the amount realized from and paid upon all sales effected of the goods of the company," for which purpose an account should be kept by the company and a copy of such account should be rendered quarterly to the applicant, and within one month of the rendering of such account the amount due for commission should be paid to him by the company.

Clause 3 provided that the applicant should devote the whole of his time and attention and his best energies to the conduct of the business and should use his best endeavours to promote the interests thereof. He should act under the direction of the board and should perform his services from time to time in such parts of the United Kingdom as the board should direct.

Clause 4 provided that the applicant should not during the continuance of his employment by the company either on his own account or as servant, agent, partner, director, or otherwise be directly or indirectly concerned, engaged, or in any way interested in any business or concern which might be similar to or which might compete with the business of the company for the time being carried on, and he should not at any time after quitting his employment by the company canvass customers or other persons with whom the company should do business, and he should not at any time make or retain for his own purposes any list of the customers of the company or of other persons with whom the company should do business.

By clause 5 the company and the three directors granted to the applicant the right, on applying to the company therefor and paying for the same at par within one year from July 1, 1915, to acquire from the company shares equal to one third of the share capital issued at that date, and the directors undertook to procure an allotment accordingly. And it was provided that if and when

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the applicant should acquire the said holding in the share capital the commission payable under the agreement should immediately cease to be payable, but his employment should continue for ten years from July 1, 1915, at 5*l.* per week. The applicant was not to part with the shares within the ten years without the written consent of the three directors.

On November 16, 1915, a compulsory winding up order was made on the petition of Jessie Mitchell and Joseph McKim, contributories, and the official receiver was appointed liquidator. This order was made on the ground that the three directors were wholly unable to agree with one another and a hopeless deadlock had resulted.

On December 3, 1915, the applicant obtained employment with Rosa Neumann, who continued to carry on a similar business after the winding up. He was engaged at 5*l.* a week, his employment being terminable at a week's notice. He was not entitled to any commission.

On January 22, 1916, the applicant sent in a proof claiming :—

(*a*) Arrears of salary and commission to the date of the winding up ;

(*b*) Damages for the loss of salary for the seven and a half months from the winding up to June 30, 1916, when the year for which he was definitely appointed expired ;

(*c*) Damages for loss of commission during those seven and a half months ;

(*d*) Damages for loss of salary from July 1, 1916, to June 30, 1925, on the basis that, had the company not been wound up, he would have exercised his option to take up shares under clause 5 and would have obtained a definite appointment for that period, and that the winding up had deprived him of this option.

On April 13, 1916, the liquidator admitted the proof (*a*) as to arrears of salary and commission up to the date of the winding up, and also (*b*) as to salary up to the date that the applicant obtained his new employment. He rejected the rest of the proof as to (*b*) on the ground that, having regard to the applicant's present employment, he had proved no further damage ; as to (*c*) on the ground that the applicant could not prove for unearned prospective commission ; and as to (*d*) on the ground that he had not fulfilled the condition precedent by applying for shares in exercise of his option under clause 5, and that this option and clause only applied while the company was a going concern.

On May 3, 1916, the applicant issued this summons to have the proof allowed in full. The summons was heard before Astbury J. on May 16, 1916.

G. R. Northcote, for the applicant. The period of the applicant's employment was not extended under clause 1, but his engagement was for a year certain. That contract was broken by the compulsory order of November 16, 1915. Damages under head (*b*), i.e., for loss of salary up to June 30, 1916, must be assessed as on November 16, 1915, when the contract was broken. The measure of damages at that time was seven and a half months' salary with a deduction for what the applicant might expect to earn in a new employment: *Yelland's Case.* (1) The fact that on December 3, 1915, he obtained a precarious employment at the same salary which has lasted to the present time, and will probably last until June 30, 1916, does not alter the initial measure of damages. At the date of the breach of contract, or of the proof, or of the rejection, he was certainly entitled to some damages, as there was no certainty how long his new employment would last.

As to commission under head (*c*): There was an implied agreement that the company would carry on business for a year certain so as to enable the applicant to earn his commission as manager during that period. This agreement has been broken by the compulsory order which was obtained on the petition of two of the contracting parties. The applicant is therefore entitled to damages: *In re Patent Floor Cloth Co.* (2); *Turner* v. *Goldsmith* (3); *Devonald* v. *Rosser* (4) (a piece-work agreement); *Ogdens, Ld.* v. *Nelson.* (5)

In *Ex parte Maclure* (6) Maclure was a mere local insurance agent, without any control over the business or any right to have any business actually transacted in his locality. The insurance company could at any time while still a going concern have discontinued their local business and put an end to the commission, though not

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(1) (1867) L. R. 4 Eq. 350.

(2) [1872] W. N. 61; 26 L. T. 467.

(3) [1891] 1 Q. B. 544.

(4) [1906] 2 K. B. 728.

(5) [1904] 2 K. B. 410, 419; [1905] A. C. 109, 113.

(6) L. R. 5 Ch. 737.

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to the salary. The liquidation was therefore no breach of the commission agreement. The case is distinguished in *In re Patent Floor Cloth Co.* (1) In the present case the applicant was managing director of the whole business subject to the direction of the board, and his commission was based on the whole turnover, and could not have been put an end to while the company was a going concern. The liquidation was therefore a breach of the agreement.

As to head (*d*): The applicant had a year's option to take up shares and extend his salaried appointment for a term certain ending June 30, 1925. The winding up has deprived him of this option and he is entitled to damages.

J. F. W. Galbraith, for the liquidator. The damages for loss of salary for the year certain under head (*b*) must be assessed now according to the events that have happened. On the evidence the applicant has in fact suffered no damage under this head beyond what the liquidator has allowed him. The liquidator was therefore right.

As to commission under head (*c*): In *Turner* v. *Goldsmith* (2) the destruction of the factory put an end to the manufacturing branch of the business, but there was nothing to prevent the defendant continuing the selling branch. Instead of that he discontinued business altogether and ceased to employ the plaintiff, who was engaged for a fixed term with a commission on goods sold. The plaintiff obtained damages for this breach of contract. In the present case the company and its business have entirely ceased by the compulsory order and the case is governed by the decision of the Court of Appeal in *Ex parte Maclure.* (3) The distinction drawn by Bacon V.-C. in *In re Patent Floor Cloth Co.* (1) is very thin: see Buckley on Companies, 9th ed. p. 459. A contract to continue to carry on a business is not to be lightly implied: *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (4); *Hamlyn* v. *Wood.* (5)

As to head (*d*): The applicant did not in fact fulfil the condition precedent by applying for shares, and there was an implied condition that he must apply, if at all, while the company was in existence: *Taylor* v. *Caldwell.* (6)

G. R. Northcote in reply.

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(1) [1872] W. N. 61; 26 L. T. 467.
(2) [1891] 1 Q. B. 544.
(3) L. R. 5 Ch. 737.
(4) L. R. 3 Ind. Ap. 200, 206.
(5) [1891] 2 Q. B. 488.
(6) 3 B. & S. 826.

ASTBURY J. (after stating the facts). In the first place, under head (*b*) the applicant claims that, although he has obtained employment at the same salary that he was getting from the company, and there is no substantial doubt that this employment will last till June 30, 1916, he was at the date of the liquidation entitled to some damages for prospective loss of salary because at that time it was not certain whether he would or would not be able to obtain employment for the fixed term. It is true that a person employed by a company for a fixed term at a salary is entitled on its compulsory liquidation during that term to obtain such reasonable damages as he is likely to suffer having regard to his chances of getting other employment. In the present case, however, the applicant has been paid his salary up to the time he obtained his new employment. His new employment is at the same salary, and there is admittedly little doubt that it will last till June 30, 1916, which is the termination of the fixed term for which he was employed by the company. In my judgment he has suffered no damage under this head beyond the amount he has been allowed.

The claim under head (*c*) is more difficult. The applicant contends that under the agreement he was entitled for a year certain to a commission of 5 per cent. on the company's turnover, and that by the winding up he has ceased to have the opportunity of earning that commission. He therefore claims damages under this head.

In *Ex parte Maclure* (1) a person entered into an agreement with an insurance company to act as their agent for five years, and to transact no business except for the company, in consideration of which he was to receive a fixed salary and also a commission of 10 per cent. on all business transacted. Before the five years expired the company was wound up voluntarily. It was held, affirming the decision of Romilly M.R., that the agent was not entitled to prove against the company for the loss of his commission during the remainder of the term of five years. James L.J. said: "I am clearly of opinion that the Master of the Rolls was right. . . . . It is the case of a person engaging a servant, and saying, 'I engage you for five years, I will pay you 500*l.* a year for that period —that sum is secured to you—and then, in order to give you an inducement to carry on the business effectually, properly, and

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(1) L. R. 5 Ch. 737, 739.

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prudently, I will give you 10 per cent. commission upon the net profits to be earned by that business.' I am of opinion that this was a contract which did not give the servant the right to determine what the extent of the business was to be. He could not call upon the directors to issue new policies, to accept new premiums, or to take new risks, if they were not minded to do it. He could not say, 'Such a person has brought in a policy of insurance, and you must accept that.' Because, if he had a right to say 'You must carry on the business,' he would also have a right to say 'You must carry on the business in the usual and proper manner,' and that would be giving a servant the right of controlling the master in the mode in which he chose to carry on his business. Now, I am quite satisfied that the meaning of the contract was nothing of the kind. It was never intended to give the servant the right of dictating as to the extent of business, whether more or less, or nothing, but he simply took the chance of the company finding it a profitable business and carrying it on. The company had a right to reduce the business to a minimum; and if they had a right to reduce it to a minimum, they had a right to reduce it to nothing—as far as he was concerned."

In *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (1) the appellant Cowasjee and others entered into a partnership for the purpose of establishing a factory for the manufacture of cotton twist. By the partnership agreement the shareholders appointed the appellant manager of the factory for life with a commission of 5 per cent. on goods sold on account of the factory. A decree for dissolution having been obtained on the ground that the partnership could not be carried on profitably, the appellant contended that he was entitled to compensation for loss of commission. It was held that, there being no agreement by the co-partners to renounce their right of dissolution, or to pay compensation if they exercised that right, even if the partnership were originally intended to exist during the appellant's life, the appellant was not entitled to compensation. Sir Robert Collier said: "This question arises upon the construction of the contract. It is to be observed . . . . that this is not a contract between master and servant, nor between principal and agent—at all events, not a contract pure and simple between principal and agent—but it is a contract between a partner and his co-partners. It is further to be observed that the remuneration of Cowasjee is not to be by salary, but by a commission upon sales. The distinction between the position of a man who is to be paid by a fixed salary and that of a man who is to be paid by a commission is obvious. The man who is paid by a salary is not necessarily affected by the prosperity or adversity of the company, or even by its dissolution. He may be entitled to his fixed salary whatever may happen. But a man who agrees to be paid by a commission upon sales to a certain extent speculates on the prosperity of the company; the more the company sells the more he gets, the less it sells the less he gets, and if it sells nothing he gets nothing. This distinction, which indeed is implied by the very terms used, is one which has been recognised in several cases which have come before the Courts."

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(1) L. R. 3 Ind. Ap. 200, 206.

In *Hamlyn* v. *Wood* (1) the defendants, who carried on business as brewers, entered into an agreement in writing, by which they agreed to sell to the plaintiffs, and the plaintiffs agreed to buy, all the grains made by the defendants, at the average of the rates charged each year by certain specified firms, from July 10; 1885, until September 30, 1895. In 1890 the defendants sold their business, and in consequence ceased to supply grains to the plaintiffs. It was held that a term could not be implied in the contract to the effect that the defendants would not by any voluntary act of their own prevent themselves from continuing the sale of grains to the plaintiffs for the period mentioned. Lord Esher M.R. said: (2) " The Court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist." He then referred to *The Moorcock* (3), where Bowen L.J. said: " An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either

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(1) [1891] 2 Q. B. 488.
(2) [1891] 2 Q. B. 491.
(3) (1889) 14 P. D. 64, 68.

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side." The other Lords Justices gave judgment to the same effect. Kay L.J. said (1): "The Court ought not to imply a term in a contract unless there arises from the language of the contract itself, and the circumstances under which it is entered into, such an inference that the parties must have intended the stipulation in question that the Court is necessarily driven to the conclusion that it must be implied."

In the present case the applicant is entitled to say that he was employed at a definite salary for a year certain. The order to wind up the company involved a breach of that contract, and it is not contested that he is entitled to such damages, if any, as arose from that breach. But in addition to that the company agreed that the applicant should also have a commission. On the authorities that I have referred to, apart from any other authority, that means that he was entitled to a commission, at the rate agreed, upon such business as the company should in fact carry on during the term of his employment. The company, owing to no fault of its own, came to an end, and there was and could be no business upon which that commission could be earned after the date of the winding up.

The applicant, however, contends that this is not the true ground upon which this case ought to be decided, and that *Turner* v. *Goldsmith* (2) is the class of authority which ought to apply. In that case the defendant, a shirt manufacturer carrying on business as the Priory Manufacturing Company, agreed to employ the plaintiff, and the plaintiff agreed to serve the defendant, as agent, canvasser, and traveller for five years certain. The plaintiff was to obtain orders for and sell the various goods "manufactured or sold" by the defendant as should be from time to time forwarded or submitted by sample to the plaintiff. The defendant was to pay the plaintiff 3¾ per cent. commission on all goods sold by him. After about two years the defendant's manufacturing premises were burnt down, whereupon he discontinued his business altogether and ceased to employ the plaintiff. The plaintiff brought an action for breach of contract. The Court of Appeal held that the action was maintainable on the ground that the destruction of the factory had not necessarily put a stop to the selling branch of the defendant's business, and the defendant therefore was still bound by his contract.

(1) [1891] 2 Q. B. 494.
(2) [1891] 1 Q. B. 544.

Lindley L.J. read the agreement and said (1): "It was contended by the defendant that the agreement did not contain any stipulation that the company should furnish the plaintiff with any samples, and that there was, therefore, no agreement to do what was necessary to enable him to earn commission. The answer to that is, that the company would not be employing the plaintiff within the meaning of the agreement unless they supplied him with samples to a reasonable extent. Then it was said that there is no undertaking by the company to go on manufacturing. It is true that there is no express, nor, so far as I see, any implied undertaking by the company to manufacture even a single shirt; they might buy the articles in the market. The defendant's place of business was burnt down; the defendant has given up business, and has made no effort to resume it. The plaintiff then says, 'I am entitled to damages for your breach of the agreement to employ me for five years.' The defendant pleads that the agreement was conditional on the continued existence of his business. On the face of the agreement there is no reference to the place of business, and no condition as to the defendant's continuing to manufacture or sell. How, then, can such a condition as the defendant contends for be implied?" After referring to *Rhodes* v. *Forwood* (2), *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (3), and *Taylor* v. *Caldwell* (4) he concluded (5): "Here the parties cannot be taken to have contemplated the continuance of the defendant's manufactory as the foundation of what was to be done; for, as I have already observed, the plaintiff's employment was not confined to articles manufactured by the defendant. The action therefore, in my opinion, is maintainable." Kay L.J. said (5): "If it had been shown that not only the manufactory but the business of the defendant had been destroyed by vis major, without any default of the defendant, I think that the plaintiff could not recover. But there is no proof that it is impossible for the defendant to carry on business in articles of the nature mentioned in the agreement."

I do not think that case applies to the present at all. In the present case the defendant is a limited company. That company's business has ceased to exist, not by any fault of the company, but

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(1) [1891] 1 Q. B. 548.
(2) (1876) 1 App. Cas. 256.
(3) L. R. 3 Ind. Ap. 200.
(4) 3 B. & S. 826, 833.
(5) [1891] 1 Q. B. 550.

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it has ceased to exist in such a way as that any contract by the company made to pay a definite salary for a term is broken, but the contract to pay a commission on the turnover of its business has not been broken, as far as I can see, in any sense at all. It is only a contract to pay on such turnover as the company, so long as it continues to exist as a company, shall in fact make, and I do not see anything in *Turner* v. *Goldsmith* (1) to the contrary.

On these grounds I think that the claim for damages for non-payment of commission fails.

The claim under head (*d*) is of an extraordinary character. Although the applicant did not in fact apply for any shares under clause 5, he says that owing to the winding up he has been deprived of the option of acquiring those shares within twelve months of July 1, 1915, and thereby obtaining a permanent ten years' appointment. In other words, although during the time of the company's existence he did not apply for the shares, which would have been given him had he so applied, and obtain on allotment the right to a further term of engagement, he alleges that the company, by going into liquidation, has broken its obligation to employ him for ten years, in the event of his doing an act which he has not done, or purported to do. From what I have learned of this company I should think it is extremely unlikely that this applicant would at any time during the first twelve months have applied for shares which would have rendered him liable to pay a sum of somewhere about 400*l.* for them ; but, be that as it may, I think that the applicant himself was unable, by reason of his not having done the act which is the condition precedent to his obtaining this appointment, to claim damages for the breach of this agreement ; and, secondly, I think that this agreement is an agreement within the meaning of *Taylor* v. *Caldwell* (2)—namely, that there is an implication in it that he must apply for these shares at such a time as there is an existing going company, which is able to allot them. He made no such application before the company was wound up, and in my judgment his claim in that behalf also fails.

The result is that this application must be dismissed with costs.

Leave to appeal if necessary.

G. R. A.

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(1) [1891] 1 Q. B. 544.

(2) 3 B. & S. 826.

From this decision the applicant appealed on head (*c*) for damages for loss of commission, and asked that the judgment, in so far as it disallowed the appellant's claim to prove in the liquidation in respect of damages for loss of commission, might be reversed or varied.

The appeal was heard on June 26, 1916.

Hon. F. Russell, K.C., and *G. R. Northcote*, for the appellant, made use of the same arguments as in the Court below. They also referred to *Rhodes* v. *Forwood* (1); *Northey* v. *Trevillion* (2); *Measures Brothers* v. *Measures* (3); *Ogdens, Ld.* v. *Nelson.* (4)

Clayton, K.C., and *J. F. W. Galbraith*, for the liquidator, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from the decision of Astbury J. in respect of a claim made by the managing director of a company which is in course of being wound up. He was to receive under the agreement 5*l.* a week by way of salary, and he was also entitled to a commission of 5 per cent. upon gross sales. The engagement, whether you call it an engagement of service or not, although I think it was an engagement of service, was to extend for a minimum period of twelve months. That is quite clear. By the agreement, which is dated July 20, 1915, the company appoints Mr. Raphael, who on his part accepts such appointment, to be the managing director of the company, and the appointment is to be for one year as from July 1, 1915. There was an option for the continuance for a further period of three years, but that is quite unimportant, because the company was wound up before the end of the first year. Then clause 2 is as follows: "There shall be paid to the said Samuel Mier Raphael by way of salary the sum of 5*l.* per week and a commission of 5 per cent. on the amount realized from and paid upon all sales effected of the goods of the company," and so on. I rather hesitate as to the meaning of those words in clause 2. I am not sure that it is very material, but I am disposed to think that the true view is that the salary is one thing and the commission is another, and

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(1) 1 App. Cas. 256.

(2) (1902) 7 Com. Cas. 201.

(3) [1910] 2 Ch. 248.

(4) [1903] 2 K. B. 287; [1904] 2 K. B. 410.

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Lord Cozens-Hardy M.R.

that it is not really true to say that the company is to pay a salary in the sense of a general remuneration of 5*l.* a week and a commission. The commission is treated separately in the latter part of the same clause, but however that may be, and assuming that the other view is the correct one of clause 2, the case is not really varied. Treating it as being an agreement to pay him a salary at the rate of 5*l.* a week and a commission of 5 per cent., what would be the result of that? The contract between the company and Mr. Raphael was broken when the winding up order was made. That is quite plain. There is no doubt that he is entitled to claim compensation by way of damages for the breach. The official receiver has given him, and the learned judge has approved of it, compensation for the loss of his salary of 5*l.* a week from the date of the winding up until the date when he received a salary of precisely the same amount from one of the parties to this agreement, namely, Mrs. Neumann. But he is not given any damages in respect of his not getting commission after the commencement of the winding up. Is that right or not? We have had our attention called to various decisions upon questions of law substantially like that with which we have to deal. As a general rule (I will not say there are not exceptions) no claim can be made for the non-receipt of commission unless the failure to earn the commission has been caused by the wilful act of the other party. This is a company which was wound up by the Court, and the question is whether, there having been in fact no sales upon which the 5 per cent. could be made, and the company not carrying on business at all, the managing director is entitled, not to commission at 5 per cent. upon an imaginary sum, but to general damages, including a rough estimate of what commission he might have obtained if the company had gone on. It is not open to us to reconsider what I think is the leading case upon this subject, namely, James L.J.'s decision in *Ex parte Maclure.* (1) I am quite unable to see any distinction between that case and this. There the agreement was with an insurance company. Mr. Maclure was to serve the company as their underwriter and agent for the purposes of their business in the Manchester district. He was to do no other business without the consent of the directors, and he was to do it for five years at a salary of 500*l.* per annum. He was also to receive 10 per cent. commission on the profits of each year, to be calculated as specified in the agreement, and he was to provide offices and clerks and so on, and was to receive 250*l.* a year extra in respect of that. That went on until the company was wound up, and wound up voluntarily, and subsequently continued under the supervision of the Court. That was before the five years had elapsed, and he claimed damages having regard to the commission which he would probably have earned as well as salary. Lord Romilly M.R. held that he was not entitled to anything in respect of commission, and James L.J. in the Court of Appeal agreed with his decision. James L.J.'s language is so apt and so terse that I think I had better read the material parts of his judgment. [The Master of the Rolls read the passage already cited in Astbury J.'s judgment, p. 315, supra.] I do not think it necessary to consider whether there is any distinction between that case and the case of *Turner* v. *Goldsmith.* (1) Lindley L.J. and Kay L.J. did not think there was, and I am not at all prepared to say that there is any difficulty in reconciling the two cases, and having this authority, an authority which is not merely more than forty years old, but one which, as far as I am aware, has not been questioned, it would be wrong of us to do more than to say this case is precisely within the judgment of James L.J. in *Ex parte Maclure.* (2) That was the view taken by Astbury J., and that view, as it seems to me, is right, and this appeal must be dismissed with costs.

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(1) L. R. 5 Ch. 737.

PICKFORD L.J. I agree. I think the case is governed by *Ex parte Maclure.* (2) There are two distinctions suggested neither of which seems to me to be really a distinction between that case and this. It is said that that was a case of an agent and this is the case of a servant. Mr. Maclure was employed at a salary of 500*l.* per annum to serve the company as their underwriter and agent, and he was to provide offices and receive an allowance in respect of that. I am inclined to think that it was a case of a servant, but the question whether he was a servant or an agent was immaterial to the judgment of James L.J., because he does not base his decision on the position of agent or servant at all, although as a matter of fact he treats Mr. Maclure as having been a servant. The only other distinction that was suggested was that he was only a

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(1) [1891] 1 Q. B. 544.

(2) L. R. 5 Ch. 737.

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servant in respect of one branch of the business and not in respect of the whole. I cannot see that that makes any difference in principle at all, and therefore, those being the only two distinctions suggested, I cannot see any difference between this case and *Ex parte Maclure* (1), and I agree with the decision of the Master of the Rolls.

WARRINGTON L.J. I agree for the same reason, that I have been quite unable to find any distinction between this case and *Ex parte Maclure.* (1) As to *Turner* v. *Goldsmith* (2), it is quite clear that the Court of Appeal in that case thought that it was distinguishable from *Ex parte Maclure* (1), because *Ex parte Maclure* (1) was cited, and so far as I am personally concerned I think it is distinguishable.

Appeal dismissed.

Solicitors for appellant: *Snow, Fox & Higginson.*
Solicitors for respondent: *Smith, Rundell & Dods.*

(1) L. R. 5 Ch. 737.

(2) [1891] 1 Q. B. 544.

H. C. R.

CATESBY *v.* BURNETT.

[1916 C. 631.]

EVE J.

1916

March 24.

Company—Articles of Association—Construction—Election of Directors—"Day of Election"—Adjourned Meeting—Notice—Injunction.

One of the articles of association of a limited company provided that a member should not be qualified to be elected a director unless written notice of the intention in that behalf were given to the company not less than fourteen clear days before the "day of election" of directors. The ordinary general meeting of the company was held on December 10, 1915, at which meeting, according to the articles, the two defendant directors retired by rotation. The report of the directors was not adopted; there was no election of directors, but a committee of shareholders was appointed to investigate the affairs of the company and report to a general meeting, and the meeting stood adjourned to receive this report. On February 21, 1916, written notice was given to the company by a shareholder stating that at the adjourned meeting he proposed to move the election of four named members as directors. The adjourned meeting was held on March 10, 1916, to consider the committee's report and to transact the unfinished business. The chairman ruled the notice of February 21, 1916, to be out of order, and after declaring the election of auditors said there was no further business and left the chair. Subsequently the shareholders appointed a chairman and elected the four new directors. On motion by the shareholders for an interlocutory injunction to restrain the two former directors from acting:—

Held, that the day of election of directors within the meaning of the article was the date of the adjourned meeting on March 10, 1916; that the notice of February 21, 1916, was in compliance with that article; and that the first two persons elected as directors in lieu of the two who retired were duly elected. The injunction asked for must be granted.

MOTION.

This was a motion by the plaintiff, William Edward Catesby (on behalf of himself and all other the shareholders of Slaters, Limited, except the first two defendants), asking for (1.) an injunction restraining the defendants, Sir David Burnett, Bart., and J. G. Bean, until the trial of the action or further order, from acting or purporting to act as directors of the defendant company; and (2.) an injunction restraining such defendants from preventing the plaintiff and Mrs. Thomas Price and two others from acting as directors.

The plaintiff was the owner of 950 fully-paid ordinary shares of Slaters, Limited, which had been incorporated in December, 1894. On November 29, 1915, notice was given of the twenty-first ordinary general meeting of the shareholders of the company on December 10, 1915, to receive the directors' report and statement of accounts, for electing the directors and auditors, and for transacting the ordinary general business of the company. In accordance with the provisions of the articles of the company the two directors retiring at the meeting were Sir D. Burnett and Mr. J. G. Bean, who was the general manager.

At the general meeting on December 10, 1915, Sir David Burnett was in the chair, and the directors' report and statement of accounts for the year was received but not adopted. It was resolved that a committee of five shareholders be appointed to investigate the affairs of the company and to report to a general meeting, and that this meeting should stand adjourned to receive the committee's report. There was no election of directors at this meeting. On February 21, 1916, Mr. Thomas Bickerton, one of this committee of five shareholders, gave notice by letter to the company that at the adjourned meeting he intended to move that W. E. Catesby, Mrs. Thomas Price, John M'Laren, and John Salter Cox be elected directors of the company. The adjourned general meeting was accordingly held on March 10, 1916, to receive the report of the committee of investigation dated February 16, 1916, and to transact the business left unfinished at the previous meeting. Sir David Burnett was in the chair, and the report of the committee was presented and discussed. The chairman desired that somebody should move the election of the auditors, Messrs. J. H. Champness, Corderoy & Co. It was pointed out to him by several shareholders that the next business was the election of directors, but, amid considerable uproar, the chairman declared the auditors elected. He further ruled that the notice of February 21, 1916, relating to the election of directors was out of order, and then declared that the business was closed and left the chair and the hall. Thereupon Mr. J. G. Bean handed in his resignation as director, and Mr. W. E. Catesby having been elected to the chair, a resolution was proposed and carried unanimously that the report of the committee of shareholders be adopted and the expenses paid out of the funds of the company. A second resolution was moved and seconded appointing W. E. Catesby, Mrs. Thomas Price, J. M'Laren, and J. S. Cox to be directors, and on the names being put separately, Mr. W. E. Catesby, Mrs. Thomas Price, and J. S. Cox were elected unanimously, and J. M'Laren by a majority of the shareholders present.

Maugham, K.C., and *Owen Thompson*, for the motion. Our submission is that the business which was left unfinished at the first general meeting was continued at the adjourned meeting on March 10, 1916. Article 46 (1) of the articles of association provided for this. Part of that business was the election of directors. Articles 62 and 63 deal with the election of directors, and at the adjourned general meeting it is impossible to say that directors were not elected in place of the two retiring directors. There was therefore no failure to elect directors so as to make article 63 applicable, and Sir David Burnett and Mr. J. G. Bean have ceased to be directors. The latter tendered his resignation at the adjourned meeting. The notice required by article 62 was in fact given fourteen clear days before the "date of election," which was March 10, 1916, and the chairman's ruling as to the validity ot the notice was improper.

Gore-Browne, K.C., and *MacSwinney*, for the respondents. We contend that the day fixed for the election of directors was

(1) Article 46 provided as follows: "The chairman presiding at any meeting may, with the consent of the meeting, adjourn such meeting from time to time, and from place to place; but no business shall be transacted at any adjourned meeting other than the business left unfinished at the meeting from which the adjournment took place."

Article 62: "A member, not being a retiring director, or one recommended by the directors' report, shall not be qualified to be elected a director, unless written notice of the intention in that behalf is given to the company not less than fourteen clear days, nor more than one month, before the day of election of directors."

Article 63: "Whenever an ordinary meeting fails to elect directors in lieu of the directors whose places ought to be filled up at such meeting, then the retiring directors, whose places ought to have been but have not been filled up, shall (if willing and able to act) remain in office until the ordinary meeting in the following year."

December 10, 1915, and fourteen clear days' written notice of intention to propose new directors was necessary according to article 62. That article was substantially in a form usually adopted: Palmer's Company Precedents, 11th ed. pt. i. p. 737, form 251, article 100. No such notice was given, and the notice given in February was rightly ruled out of order at the adjourned meeting. The only business left over from December 10 was the uncontested re-election of the two retiring directors and the election of auditors. The adjourned meeting was only part of the original general meeting, and a meeting cannot be divided. Sir David Burnett and Mr. J. G. Bean continued to be directors until the next general meeting of the company in accordance with article 63. The proceedings at the meeting after Sir David Burnett left the chair were irregular, and there was no proper election of directors to fill the places of the retiring directors.

EVE J. It is not necessary, in order to determine the questions arising on this motion, that I should go into the serious matters in difference between one set of shareholders in this company and the defendants Sir David Burnett and Mr. Bean. The facts relevant to the issue which I have to decide are few, and, not being in dispute, it is unnecessary for me to recapitulate them. There emerge from these facts, first, the question whether it was competent for any person to give a notice of intention under article 62 on any date subsequent to December 10, 1915, or, to speak with greater exactitude, on any date subsequent to a day being fourteen clear days previous to December 10; secondly, the question whether, if it were competent to give such notice, a valid notice was in fact given; and, thirdly, two or three questions of a subsidiary character which only arise assuming that I answer the first two questions in the affirmative, and which relate to the conduct of the meeting of March 10, 1916, and the procedure thereat after Sir David Burnett had vacated the chair and left the room. It is contended on behalf of the defendants that no notice could be given under article 62 after the meeting of December 10, because the notice contemplated by that article ought to have been in the company's hands not less than fourteen clear days before the day of election of directors, and that such day was December 10. Undoubtedly one object of an article framed on the lines of article 62 is to afford the directors and those responsible for the management of the company an opportunity of considering the antecedents, and more particularly the qualifications, of any person who may be proposed or suggested as a director in the place of a retiring director. It may also be that another object for which the article is inserted is to give the company an opportunity of informing the shareholders that the re-election of a retiring director is to be contested by a particular individual. But considerations of this sort have nothing to do with the construction of the article, and upon that the dispute turns upon the point whether in the circumstances here present "the day of election of directors" was December 10, 1915, or March 10, 1916. Undoubtedly the day originally contemplated was December 10, 1915. The meeting of that date was summoned for the purpose, inter alia, of electing directors in the place of those who were retiring, and so far that was incontestably the day of the election. At that meeting, had the election been proceeded with, it would not have been competent for any person to propose or carry an effectual resolution for the appointment of any member as a director in the place of a retiring director, because, in fact, no notice of any intention in that behalf had then been given to the company. But the election was not proceeded with on that day, and, in the events which happened, the true "day of election" was March 10, 1916, and not December 10, 1915. It cannot be that the day of election of directors can be for some purposes December 10, 1915, and for other purposes March 10, 1916. It must be one or the other; and when I put to Mr. Gore-Browne the question as to the date from which the two months would run within which a newly appointed director was required to take up his qualification shares he candidly admitted—as I think he was bound to admit—that had directors other than retiring directors been elected on March 10 the two months would have run from that date and not from December 10, and for this obvious reason, that had the two months run from the last-mentioned date the directors never could have acquired their qualifications within the time limited. I have no doubt that according to the true construction of article 62 the "day of election" was in this case March 10, 1916. Mr. MacSwinney suggested that the business undisposed of on December 10 and left over to be dealt with on March 10 was the uncontested re-election of the retiring directors, and not a contested election between them and the four persons whose names were notified to the company as candidates in the month of February, and he argued that the contested election was not, therefore, business left undisposed of at the meeting of December 10. I cannot accede to that argument. In my opinion the true result of what took place on December 10 was to substitute as the day of the election of directors March 10 for December 10 and thereby to transfer to the later date all rights and obligations which down to the time of substitution were attached and incidental to the earlier date.

Then I turn to the notice. There is no obligation here, in giving the notice, to set out in terms the form or even the substance of any resolution which the party giving the notice contemplates proposing. It is enough if he notifies to the company the name or names of the member or members intended to be proposed to fill the vacancies caused by the retiring director or directors, and the mere fact that the person giving the notice includes in it a number of persons in excess of the number of retiring directors cannot, in my view, operate to defeat the validity of the notice. I must assume that he knows that four is twice two and not equivalent to two, but he gives the excess number for a variety of reasons. In the first place this notice has to be given at least fourteen clear days before the meeting is held. It is possible in that interval that one of the nominees may die, or he may get rid of his shares and cease to have any interest in the company, or other events may intervene, including his own refusal to act, which may leave the nominator in a difficulty if he has not safeguarded himself against such contingencies as I am suggesting by nominating a number in excess of the vacancies to be filled. Nor, again, is the fact that he states that those persons whom he enumerates will be proposed as directors conclusive or even indicative of an intention to nominate them en bloc. He will, before the time for submitting his resolution to the meeting arrives, take care so to frame it as to avoid any possible irregularity. In my opinion, therefore, it was competent to Mr. Bickerton to give the notice which he did on February 21, 1916, and the notice which he so gave was a compliance with the provisions of article 62.

Having answered the first two questions in the affirmative, I come to the subsidiary questions relating to the proceedings after Sir David Burnett had vacated the chair. [His Lordship considered these questions, and continued :] In my opinion the proceedings were regular ; in the events which have happened Sir David Burnett and Mr. Bean both ceased to be directors on March 10, 1916, and on the same day Mr. Catesby and Mrs. Thomas Price were duly appointed directors. In the result the plaintiffs are entitled to an injunction restraining the two first-named defendants from continuing to act as directors and the company from refusing to allow the two duly elected directors to act as such. It may be that the expression of the opinion of the Court will be sufficient, but unless the parties accept that view and are prepared to act upon it I must grant the injunction practically in the terms of the notice of motion.

Solicitors for applicant : *Spyer & Sons.*
Solicitors for respondents : *Edell & Co.*

G. M.

C. A.
1916
May 22, 23.

In re THOMAS.
ANDREW *v.* THOMAS.
[1915 T. 1253.]

Company—Reserve Fund—Tenant for Life and Remainderman—Exchange of Shares for Shares in New Company—Distribution of Reserve Fund by Way of Dividend.

The Cambrian, a working colliery company, had accumulated out of profits a large reserve fund invested in the shares of a trust company which also held shares in three other working colliery companies. In 1913 a combine company was incorporated for the purpose of acquiring the shares in all four working companies, the shareholders in which were offered the opportunity of exchanging their shares for shares in the Combine on advantageous terms, and practically the whole of the shareholders availed themselves of the offer and deposited their shares under a provisional agreement by which provision was made for the deposit in a bank of the share certificates in the four working companies and for the allotment in exchange of shares in the Combine. The annexed scheme set out the rate of exchange in the case of each of the four working companies,

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and under the heading dealing with the Cambrian added a note that the Cambrian's assets in the Trust Company (referring to the reserve fund) would be distributed among the Cambrian's ordinary shareholders. Immediately after the adoption of the provisional agreement the directors of the Trust Company exchanged all shares held by that company in the three other working companies for shares in the Combine, and subsequently went into liquidation. Other steps were taken, and a resolution was passed by the Cambrian for the distribution of the assets to be received by the Cambrian in the liquidation of the Trust Company, representing the reserve fund, by way of dividend amongst their ordinary shareholders. As the result of these transactions the shares in the Combine thus acquired by the Cambrian and some cash were distributed among their ordinary shareholders. On a summons taken out by trustees raising the question whether the shares and cash so distributed to them ought as between tenant for life and remaindermen to be treated as capital or income :—

Held, affirming the decision of Sargant J. [1916] 1 Ch. 383, that the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend and not by way of reduction of capital; that, looking at the real transaction, there was no intention to capitalize the reserve fund; and that the shares and cash in the hands of the trustees must be treated as income and not as capital.

APPEAL from a decision of Sargant J. (1)

The following statement of facts is taken from Sargant J.'s written judgment :—

"This summons raises questions in relation to the trusts of two instruments—namely, first, a settlement dated July 26, 1882, and executed on the marriage of the late Samuel Moreton Thomas and the defendant, Mary Hamilton Thomas, and, secondly, the will dated April 3, 1910, of the said Samuel Moreton Thomas. The question in each case is the same, and is whether the whole or any and what part of certain shares and cash which are in the hands of the trustees of the instrument in connection with their former holding of shares in the Cambrian Collieries, Limited (hereinafter called the Cambrian Company), ought to be held by them as capital, or should be treated as income and paid to the defendant Mary Hamilton Thomas. At the time of the transactions hereinafter mentioned there were 2255 ordinary shares in the Cambrian Company held on the trusts of the marriage settlement, and the defendant Mary Hamilton Thomas was, as she still is, beneficially entitled to the income of these trust funds. At the same period there were 20,620 ordinary shares in the Cambrian Company held on the trusts of the will, and the defendant Mary Hamilton Thomas was, as she still is, entitled as to one half of these trust funds to an absolute beneficial interest, and as to the other half of such funds to the income thereof during her life.

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(1) [1916] 1 Ch. 383.

"The Cambrian Company is a very prosperous concern, and had by the month of January, 1913, accumulated a large reserve fund which was invested in the shares of a company known as the Cambrian Trust Company, and hereinafter called the Trust Company, and indeed comprised the whole of these shares. The Trust Company, as its name implies, was not itself a working company, but held shares in other companies, namely, the Glamorgan Coal Company, Limited, the Naval Colliery Company (1897), Limited, and the Britannic Merthyr Coal Company, Limited. These last-named three companies (hereinafter sometimes referred to as the Glamorgan, the Naval, and the Britannic Companies respectively) owned pits adjoining the properties of the Cambrian Company, and they and the Cambrian Company are hereinafter sometimes referred to as the four working companies.

"In March, 1913, a company known as the Consolidated Cambrian, Limited, and hereinafter called the Combine, was incorporated with a share capital of 2,000,000*l.* for the purpose of acquiring the shares in the four working companies. The shareholders in the four working companies were offered the opportunity on advantageous terms of exchanging their shares for shares in the Combine, and practically the whole of these shareholders, including the trustees of the settlement and will now in question, availed themselves of the terms of exchange offered, and for that purpose deposited their shares under a provisional agreement dated March 19, 1913, next hereinafter stated. By that agreement, which was expressed to be made between the Combine of the first part, such registered holders of the shares of the four working companies as should deposit their share certificates as therein provided (thereinafter and hereinafter called the depositing shareholders) of the second part, and the National Provincial Bank of England (therein and hereinafter called the bank) of the third part, provision was made for the deposit by

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the depositing shareholders with the bank of share certificates in the four working companies respectively, and for the transfer of the shares represented thereby to the Combine, and for the allotment to the depositing shareholders by the Combine of the shares in the Combine constituting, under an amended scheme, the consideration for the transfer of their shares in the four working companies. The scheme so annexed was expressly made dependent on a defined proportion of the holders of each class of shares in the four working companies making the exchange in question, and it set out most particularly under four different headings representing each of the four working companies the rate at which the shares in each of those companies were to be exchanged for shares in the Combine. Under the heading dealing with the shares of the Cambrian Company this very important note appeared, namely: 'Note.—Cambrian Collieries' assets in Cambrian Trust will be distributed among Cambrian ordinary shareholders.' No corresponding note, and indeed no note of any kind, appeared under the headings dealing with the shares of the Glamorgan Company, the Naval Company, and the Britannic Company.

"A great deal of discussion has taken place with regard to the meaning and effect of this note, but I do not think that there is any real doubt on this point. Its object undoubtedly was to determine the rights as between the depositing shareholders in the four working companies. Their proper proportion inter se of the shares of the Combine obviously depended on the relative value of the assets of the four working companies, and a proper valuation had no doubt been made for that purpose, which had obviously excluded the value of the reserve fund of the Cambrian Company, which itself depended indirectly on the values of the assets of the rest of the four working companies. Had there been no such note as that in question the transfer of the shares in the Cambrian Company would obviously have included a transfer of rights in the reserve fund of the Cambrian Company, which had been excluded from the valuation of their assets. And accordingly the note was inserted to make it clear that these rights were to be excluded from the transfer, and that the reserve fund of the Cambrian Company was to be distributed amongst the shareholders—not merely the depositing shareholders—of that company so far as they held ordinary shares. There were obviously only two ways in which such a distribution could be made—namely, first, a distribution of the fund as undivided profits and by way of dividend, and, secondly, a distribution of the fund by way of return of capital in excess of the requirements of the Cambrian Company. The first was the obvious and easy way, and would leave the prima facie claim of the shareholders in the Cambrian Company to have the fund distributed by way of dividend unaffected. The second would involve the ordinary steps, including the sanction of the Court, incidental to a formal reduction of capital, and would also involve the Combine ultimately receiving on transfer ordinary shares in the Cambrian Company of a less nominal amount than that at which they stood at the date of the scheme. In my opinion the terms of the note and the scheme generally pointed to an intention to adopt the first of these two methods of distribution. Indeed, otherwise it must have been made subject to the approval by the Court of the proposed reduction of capital.

" The provisional agreement subsequently became binding on the parties thereto (including the registered shareholders in the four working companies who had deposited their share certificates with the bank) on or about April 22, 1915. No complaint is made of the conduct of the trustees of either the settlement or the will in so depositing their share certificates, and I am satisfied that they exercised a wise discretion in so doing.

" Immediately after the adoption of the provisional agreement the directors of the Trust Company (who were also the directors of the Cambrian Company) exchanged all shares held by the Trust Company in the Glamorgan, Naval, and Britannic Companies for a right to an allotment of the appropriate number of ordinary and preference shares in the Combine, and subsequently the Trust Company went into liquidation by special resolution passed on September 26, 1913, and confirmed on October 11, 1913.

" Various other steps were taken for the purpose of carrying out and giving effect to the aforesaid provisional agreement and scheme. These steps do not appear to me really to affect the position constituted by the scheme, but it may be well to state them substantially as they appear in paragraphs 16, 17, 19, 20, 21, and 22 of the affidavit of the plaintiff, John Howard Thomas. Paragraph 16 is: ' By an indenture . . . . dated April 12, 1913, and made between the Combine of the first part, such registered holders of ordinary shares in the Collieries Company '—meaning the company which I have called the Cambrian Company—' as had deposited or should thereafter deposit their share certificates in accordance with the provisions of the said agreement of March 19, 1913, of the second part, and the above mentioned bank of the third part (after reciting (inter alia) the said agreement '—that is, the provisional agreement —' and that it was one of the terms therein that certain assets of the Collieries Company (being those represented by shares of that company in the Trust Company) should be distributed among the then holders of ordinary shares in the Collieries Company and that such assets included 120,000 shares in the Trust Company the whole of which represented accumulated profits, and reciting that it was proposed to give effect to the terms of the said agreement by the Collieries Company declaring out of its accumulated profits a dividend distributable among the holders of ordinary shares in the Collieries Company and payable either in cash or specie of an amount equal to the value of the said shares held by the Collieries Company in the Trust Company or the surplus assets of the Trust Company remaining after payment of its debts and liabilities and the costs of its liquidation; and after reciting that such dividend might not have been declared or paid before the said exchange of shares between the Cambrian depositing shareholders and the Combine should have been effected, it was witnessed that the Combine thereby acknowledged and declared that if and to the extent that any dividend should after the making of the exchange of shares referred to in the said agreement of March 19, 1913, be declared or paid by the Collieries Company out or in respect of the profits of such company then represented by the shares held by it in the Trust Company or out or in respect of the amounts receivable by the Collieries Company in the liquidation of the Trust Company, the Combine should not be entitled as holder of the said exchanged shares or any of them to participate in such dividend, but the same should belong to the persons respectively who were the holders of the shares in the Collieries Company immediately before the making of the said exchange.' Then paragraph 17: 'A circular letter dated April 22, 1913, was issued by the Collieries Company stating that the scheme referred to had been declared binding by the

Combine and that a supplementary deed (being the said deed dated April 12, 1913) had been executed. In accordance with such scheme the trustees of the said settlement on May 7, 1913, and the trustees of the said will on April 28, 1913, deposited the whole of the shares in the Collieries Company held by them respectively. The transfers of such shares executed by the respective trustees were received by the Combine as to those subject to the said settlement on June 13, 1913, and as to those subject to the will on May 17, 1913, and on June 6, 1913, the Combine was registered as shareholders in the Collieries Company in respect of both sets of shares.' Then paragraph 19 says: 'At an extraordinary general meeting of the Collieries Company held on December 15, 1913, the following resolution was duly proposed and seconded and carried unanimously: "That in pursuance of the agreement dated April 12, 1913, and made between Consolidated Cambrian, Limited, of the first part, such registered holders of ordinary shares of and in this company as had deposited or thereafter should deposit their share certificates in respect of the said ordinary shares in accordance with the provisions of an agreement dated March 19, 1913, of the second part, and the National Provincial Bank of England, Limited, of the third part, the whole of the moneys and specific assets received or to be received by this company or to which this company is entitled in the liquidation of the Cambrian Trust, Limited, consisting of" '—and then the amounts of the shares are mentioned—' "or the right to an allotment thereof and of a certain amount in cash (such moneys or specific assets representing certain investments of profits made by this company and profits on such investments) be distributed by way of dividend among the persons entitled thereto by virtue of the said agreement and in manner provided thereby; and that in so far as such assets consist of the right to an allotment of fully paid shares in Consolidated Cambrian, Limited, such distribution be effected by this company requesting the liquidator of the Cambrian Trust, Limited, to procure the allotment of such shares to be made direct to the persons entitled thereto by virtue of the said agreement, and that the directors be and they are hereby authorised to take all necessary steps and to execute all necessary documents for carrying this resolution into effect." ' Paragraph 20 is: 'At a meeting of the directors of the Collieries Company held on December 15, 1913, the following resolution was duly passed: "That in pursuance of the resolution of the shareholders passed at the extraordinary general meeting of the company held this day the liquidator of the Cambrian Trust, Limited, be requested and authorised to procure the allotment of the shares in Consolidated Cambrian, Limited, forming part of the dividend declared at the said meeting to be made in accordance with the list produced at this meeting and for the purpose of identification signed by the chairman of this company."' Then paragraph 21 is: 'In due course, namely, on December 22, 1913, the shares thus acquired by the Collieries Company in the Combine were distributed as aforesaid amongst the ordinary shareholders of the Collieries Company in specie in the following proportions, namely'—and then the proportions are given. Then: 'At the same time there was a cash distribution of ninepence halfpenny per share amongst such shareholders. These distributions were in addition to and at a different time from the usual half-yearly dividends which were duly paid at the usual rates.' Then paragraph 22 is: 'In the case of limited beneficial owners where authority had been given to them to receive the dividends the Collieries Company paid the usual dividends accordingly, but in the matter of the new shares so distributed as aforesaid the company did not issue them under such authorities but in the names of, and paid the balance of cash to, the persons in whose names the ordinary shares actually stood.'

"By virtue of these transactions there have now been received by the trustees of the settlement and will in question in respect of their proportion of the distribution of the reserve fund of the Cambrian Company the following shares and moneys—namely, by the trustees of the settlement 1691 ordinary shares of 1*l.* each and 2255 six per cent. cumulative preference shares of 1*l.* each in the Combine and 89*l.* 5*s.* 3*d.* cash, and by the trustees of the will 7655 ordinary shares of 1*l.* each and 10,207 six per cent. cumulative preference shares of 1*l.* each in the Combine and 404*l.* 0*s.* 6*d.* cash. And the question now arises whether the whole of the benefits so received by the trustees of the settlement and a moiety of the benefits so received by the trustees of the will ought to be retained by them as capital, or ought to be paid to the defendant Mary Hamilton Thomas as income. The other moiety of the benefits so received by the trustees of the will of course belongs to Mrs. Thomas, inasmuch as she is entitled to a moiety of the corpus of the residue under the will."

Sargant J. held that the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend and not by way of reduction of capital; that, looking at the real transaction, there was no intention to capitalize the reserve fund; and that the shares and cash in the hands of the trustees must be treated as income and not as capital.

The parties entitled in remainder appealed.

P. O. Lawrence, K.C., and *F. Baden Fuller*, for the appellants. According to the scheme the shares representing reserve fund were to be capitalized, and not distributed as a bonus dividend, and ought to be treated as capital in the hands of the trustees. It is not suggested that the trustees have done anything wrong, or that they have altered any rights by concurring in the scheme. *Bouch* v. *Sproule* (1) and similar cases do not really touch the present case. The substance of the transaction must be looked at to ascertain whether the fund has in fact been capitalized. The intention of the company must be considered: *In re Armitage* (2); *In re Evans.* (3) This transaction was really a sale by the trustees. They had no option but to go on, on the footing that they were receiving the full capital value of their shares. They could not discriminate between their beneficiaries: *Scholefield* v. *Redfern* (4); *Irving* v. *Houstoun* (5); *In re Sir Robert Peel's Settled Estates.* (6)

Maugham, K.C., and *T. H. Attwater* and *J. M. Gover*, for the respondents, were not called upon to argue.

LORD COZENS-HARDY M.R. We will not trouble you, Mr. Maugham.

This is an appeal from Sargant J., upon the hearing of which we have had the advantage of very full and careful arguments by Mr. Lawrence and Mr. Baden Fuller. Having listened attentively to those arguments, I can see no reason for doubting that the judgment of Sargant J. was perfectly right.

(1) (1887) 12 App. Cas. 385.
(2) [1893] 3 Ch. 337.
(3) [1913] 1 Ch. 23.
(4) (1863) 2 Dr. & Sm. 173, 182.
(5) (1803) 4 Pat. Sc. App. 521.
(6) [1910] 1 Ch. 389, 400.

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The question arises under the trusts of a marriage settlement. I put aside the will, because it has been agreed on all sides that what applies to the settlement applies also to the will. Under the settlement certain shares in the Cambrian Collieries were vested in trustees upon trust for the tenant for life, and then as capital to a granddaughter of the marriage, whose trustees are the present appellants. The position of trustees holding for beneficiaries shares in a company is a peculiar one. The company do not acknowledge trusts; the company have nothing to do with them. They simply say "You, A. B. or A. B. and C. D., are shareholder or shareholders; and we have no concern with questions as between capital and income under your instrument; we disregard all that; we look upon you simply as our shareholders; and you must take the consequences of that." Now the Collieries Company had been exceedingly successful. It had the collieries, and had paid large dividends and had reserved out of profits a reserve fund of a very considerable amount, which had been invested first of all in what is called the Trust Company and ultimately in what is called the Combine. The Combine was intended to be and was a scheme for uniting together the beneficial interests of four collieries, namely, the Collieries Company, the Glamorgan Company, the Naval Company, and the Britannic Company. In order to do that very unusual arrangements were necessary. An offer was made to the shareholders in the Collieries Company (I mention that, as being the one with which we are concerned here) to this effect: "Will you deposit your shares with the bank; and if that is done, and the scheme is assented to by a sufficient number to show that it will work, you will get a certain benefit in the Combine." The terms of the scheme are stated in what has been called the deposit agreement. It amounted to this: "If you come into this, you get for each ordinary share two and a half 6 per cent. cumulative preference shares of 1*l.* each in the new company, or two and a half ordinary shares of 1*l.* each in the new company." But then it was manifest and known to everybody that the Collieries Company had not merely their collieries, which represented their original capital, but they had a very large sum—it is quite unimportant what the figures may be, but 150,000*l.* has been mentioned—a very large sum indeed representing undivided profits. While nothing was done, no doubt it greatly increased the cash value in the market of those shares. But what was the position of this reserve fund? I think it is quite clear that the Collieries Company, if they were so minded, and apart from any idea of a combine, might have declared a dividend and divided their fund as a fund applicable to meet that dividend; in other words, they might have put into the pockets of the tenant for life under the present marriage settlement the whole or such part as they thought fit of this accumulated reserve fund, invested as it was. It was an inherent danger in the investment. The trustees in the present case were perfectly entitled to take the shares and to keep them—the instrument sanctioned it; but in every case of this kind there is a risk between tenant for life and remainderman of their rights being affected by resolutions of the company, so that their rights are not really such as they would be in a settlement where the trust estate is invested in ordinary trustee securities of that nature. The trustees here came into the scheme; they accepted two and a half ordinary shares of 1*l.* each in the company. But then what was to happen to that which represented the reserve fund, or the undistributed dividend, the Cambrian Collieries' assets in the Cambrian Trust? It is rather complicated. The Cambrian Trust was an ingenious scheme for working out the ultimate arrangement between the Collieries Company and the Combine. The Cambrian Collieries' assets in the Cambrian Trust would be distributed among the Cambrian ordinary shareholders; that is to say, in addition to the ordinary shares, that is the two and a half shares going to the holders of the ordinary shares,—in that case the Cambrian Trust—there was a further sum representing undistributed profits which was to go direct among the Cambrian ordinary shareholders. In order to work that scheme out there was what Mr. Baden Fuller has conveniently called a direct and an indirect distribution. There was the allotment of two and a half ordinary shares to each holder of the ordinary shares of the Collieries Company; and there was a separate arrangement—the reasons for which I think are sufficiently manifest having regard to *Trevor* v. *Whitworth* (1) and such cases—that those assets, so far as they are represented by shares in the Combine, should not be distributed to the Trust Company, but go direct to the individual

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(1) (1887) 12 App. Cas. 409.

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shareholders in the Collieries Company. How was that carried out? The articles were altered. Power was taken to declare a dividend in specie. The Cambrian Trust was wound up, and a resolution was passed which it is not necessary for me to read through in detail, but of which the language was perfectly clear taken by itself and admits of no doubt—it was resolved that these undistributed profits, the reserve fund, should be allotted as dividend and not as capital to the ordinary Cambrian shareholders. The intention of the company was clear beyond words. That it was a most reasonable and convenient mode of carrying through the transaction is from the point of view of the company quite clear. I think there can be no possible reason why the company should have taken any other course. The company did not want the capital, they did not want to capitalize the sum, and we are asked really to go in the teeth of the written document if we take any other view. But then it is said by Mr. Baden Fuller: "That cannot be so. The trustees really sold, and must be taken by coming into this scheme to have sold, their interest in the Collieries Company for two sums, all of which would represent purchase-money of the shares which they had, and of their interest in the company; and they must be treated in a different way to any individual shareholders, because the trustees had no right to come into a transaction which might have proved seriously prejudicial to the tenant for life." That is an argument about which there is a plausibility at first, but when you look at it it will not bear discussion. There is no case here of breach of trust on the part of the trustees; nobody suggests it. I will not even hint a doubt that the trustees acted in perfect good faith here and for the advantage of their cestui que trust. If they had kept out of the scheme, it may be that they would have been able to get the dividend—not in specie, it may be—I am not sure that they could; but, whether they could or could not, I certainly would not be the first to deal with this on any other footing than that the trustees honestly and in perfect good faith came into this scheme, and, coming into the scheme, they must be taken just in the same way as any other shareholder.

The law on the case has been very carefully brought to our notice. *Bouch* v. *Sproule* (1), the leading authority in the House of Lords, seems to me to put it in a way which absolutely binds us. It was this: that whether it is capital or income depends upon the intention of the company declaring the so-called dividend. It will not be decided one way or the other by calling it dividend. I quite agree that we must look to see what is the real intention of the parties. Here it is called dividend. Is there anything to suggest an intention on the part of any human being to capitalize this sum which was referred to in this note to the scheme? In my opinion there is none. Without going through the documents more in detail, and without discussing the authorities, all of which I think are for the purposes of this appeal consistent, I think the appeal fails.

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(1) 12 App. Cas. 385.

PICKFORD L.J. I am of the same opinion. It seems to me that the principle was stated correctly by Neville J. in *In re Evans.* (1) He says that in *Bouch* v. *Sproule* (2) the House of Lords are perfectly clear in saying that you must see what it was the company intended. In my opinion in all these cases it is a question of fact, and the decision must turn upon what was the intention of the company. The intention of the Collieries Company, as expressed by their resolution and by the documents before us, undoubtedly was to distribute this reserve fund as dividend, and not to take it and use it and convert it into capital—not to make it capital. But it is argued by the appellants that although they said so by the resolution, and although every document is to the same effect, they did not really mean it; they only put it in that form for the convenience of the Combine, in order to prevent them sinning against the doctrine that they must not hold any interest in their own shares. I daresay that may have had some influence; I do not know whether it had or not, and I do not think it matters. It may have had some influence in deciding the Collieries Company to take the course they did; but I cannot doubt that they did take the course, and did take it meaning to take it, and that their intention was that this reserve fund should be distributed as dividend. Sargant J. says (3): "I can find no reason in principle against a company selling its main assets for a capital consideration but reserving a part of its assets representing profits for the purpose of declaring a dividend

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(1) [1913] 1 Ch. 23, 32.

(2) 12 App. Cas. 385.

(3) [1916] 1 Ch. 393.

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thereout"; and I do not think that that proposition really is quarrelled with, but what is said is that the trustees could not do this. I think the answer is that the trustees did not do it; it was the company that did it; it was the company that decided to distribute this reserve fund as dividend; and the trustees must either come into that scheme or keep out of it like any other shareholder. I have not the slightest reason for thinking that they did not fully do their duty as trustees; but, whether they did or not, it seems to me that we have to look at what is the position looking at what they did, and that position is the same as I said of the intention of the company, namely, that this reserve fund should be distributed as dividend; and, as has been pointed out by the Master of the Rolls, there was not the slightest object in the company capitalizing it, and there is no reason for believing that they ever meant to do anything of the sort.

I therefore agree that Sargant J.'s decision was quite right.

Neville J. I am of the same opinion. If we deal only with what the company expressed in its resolutions, there is no doubt that the reserve fund was distributed as income and not as capital; but it is said that if you look at the whole transaction, you see that that way of doing it was only to avoid a legal difficulty under *Trevor* v. *Whitworth.* (1) That may have been the motive, but the motive does not affect the intention. What we have to consider is not why they did it, but what they did, and what intention they had in so doing. The reserve fund had been dealt with in this way: A Trust Company had been formed to hold the reserve fund, and they had invested it in the purchase of the shares of the three adjoining companies, which were with the Cambrian, the subject of the Combine, and of course, when the Combine scheme developed, the new company desired to get as far as possible all the shares in the other companies. They find that the Trust Company hold 50 per cent. in each case of the shares of the three adjoining companies, and they adopt a device of exchanging the reserve fund of the Cambrian Collieries Company into Combine shares; they exchange first of all with the Trust Company Combine shares for the shares in the three companies that the latter held, and then the reserve fund is divided, mainly in specie, amongst the Cambrian Colliery shareholders; the result of which is that, instead of the shares in the companies which the Trust Company originally held, they get the Combine shares in payment, and thereupon the transaction, so far as the Combine is concerned, is over, and their object has been achieved without the necessity for capitalizing any part of the reserve fund. It seems to me, therefore, that it is impossible to say here that there was any intention on the part of the Cambrian Collieries Company to do more than, so far as the shareholders are concerned, divide the reserve fund between them.

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(1) 12 App. Cas. 409.

Appeal dismissed.

Solicitors for appellants: *Torr & Co., for Roberts & Andrew, Exeter.*

Solicitor for respondents: *Newton G. Driver.*

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BROOKE *v.* PRICE.

[1915 B. 2429.]

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June 5, 6, 27.

Revenue — Income Tax — Deduction—Agreement—Annual Payment—Taxable Income—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 102, 103.

In June, 1912, a decree absolute for the dissolution of the marriage between Mr. Owen Talbot Price and his wife was pronounced. She subsequently married Mr. J. H. Brooke. A deed was executed whereby Mrs. Brooke (who was possessed of large means under the will of her father, on which income tax was paid by trustees) charged all her income to which she was entitled under his will with the payment of certain sums and directed that the trustees of the will should out of the income received by them (which would otherwise be payable to her) during the joint lives of O. T. Price and Betty G. Price, the only child of the marriage, the custody of whom had been given to her father, pay to O. T. Price for their maintenance an annual sum equal to one fourth part of the annual net income (after income tax on the whole income of Mrs. Brooke had been paid), or if that amounted to less than 2500*l.* a year, then the clear annual sum of 2500*l.* a year (without deducting income tax therefrom).

Mrs. Brooke took out a summons to determine the questions whether on the true construction of the deed when the one fourth share became less than 2500*l.* a year the sum payable to O. T. Price for maintenance was payable less income tax; and whether the provisions of the deed making that sum payable without deduction of income tax were not void under ss. 102 and 103 of the Income Tax Act, 1842; and asking for a declaration that Mrs. Brooke was entitled to deduct the tax accordingly:—

Held, affirming the decision of Neville J., that the annuity not being payable out of taxable income was not within the provisions of s. 102, and therefore that Mrs. Brooke was not entitled to deduct income tax.

APPEAL from a decision of Neville J.

The following statement of facts is taken from the judgment of Warrington L.J.:—

The facts are simple, and are not in dispute. The defendant and the plaintiff were formerly husband and wife. On June 24, 1912, a decree absolute for the dissolution of the marriage was pronounced upon the defendant's petition. There was one child of the marriage, a daughter, who is in the custody of the defendant. The plaintiff was and is entitled to a large income under the will of her father, derived from investments in the hands of the trustees of that will. After the decree nisi pronounced on December 14, 1911, the defendant presented a petition for permanent maintenance for himself and the child. In her answer to that petition the plaintiff offered to secure to the defendant one fourth of the income above mentioned, and to undertake that such one fourth should not be less than 2500*l.* This offer was accepted. The registrar in due course reported that the parties were in agreement as to the order to be made on the petition, and submitted that the plaintiff be ordered to give a first charge on the income for payment thereout by the trustees during the joint lives of the defendant, the plaintiff, and the child to the defendant for his and the child's maintenance of one fourth of the plaintiff's annual net income (after income tax on the whole deducted) accruing from time to time in respect of her share of her father's estate and payable to her or her assigns, but this not to be less than 2500*l.*, and if less, then to pay 2500*l.* free of income tax, and that it be referred to the conveyancing counsel to settle the necessary deed. The deed was duly settled, and by an order dated June 14, 1912, it was ordered that the plaintiff should execute it. This was done. The deed is dated June 14, 1912, and is made between the plaintiff, called the "settlor," of the one part and the defendant of the other part. It contains the following material clauses 1, 2, and 3: "(1.) The settlor as settlor doth hereby charge all the income to which she is or shall become entitled during her life from or in respect of her said one equal sixth share in the testator's residuary estate and from or in respect of all or any further shares or share which during her lifetime may accrue and be added to the said one equal sixth share and from or in respect of all accumulations which have already been or shall hereafter during her lifetime be made of any such income as aforesaid (all which said one equal sixth share and further shares or share and accumulations are hereinafter included in the expression 'the settlor's settled share') with the payment thereout as a first charge thereon and in priority to any payment thereout to the settlor or her assigns of the respective annual sums hereinafter mentioned during the respective period hereinafter specified to the respective persons hereinafter named. (2.) The settlor doth hereby declare and direct that the said Thomas Peter Clarkson and Richard Rabbidge or the survivor of them or other the trustees or trustee for the time being of the said will of the testator or of the settlor's settled share under the said will (all of whom are hereinafter whenever the context so admits included in the expression 'the trustees') shall out of the income received by the trustees and which would but for this direction be payable by them to the settlor or her assigns pay the respective annual sums hereinafter mentioned during the respective periods hereinafter specified to the respective persons hereinafter named. (3.) As from the date of these presents and thenceforth during the period of the joint lives of the settlor and the said Owen Talbot Price and Betty Gillian Price and whilst the said Betty Gillian Price shall be under the age of twenty-one years an annual sum equal to one fourth part of the annual net income (after income tax on the whole income has been paid) which shall from time to time during the period aforesaid accrue and would but for these presents be payable to the settlor or her assigns from or in respect of the settlor's settled share or if one fourth part of the said annual net income shall be less than the clear sum of 2500*l.* then the clear annual sum of 2500*l.* (without deducting income tax therefrom) out of such annual net income shall be paid to the said Owen Talbot Price for the maintenance of himself and the said Betty Gillian Price." It appears from the recitals to the deed that the plaintiff's income is derived from investments in the hands of the trustees, and the income tax would therefore either be charged at the source or would be payable by the trustees.

Mrs. Brooke claimed to be allowed to deduct income tax from the annuity payable to O. T. Price, and took out a summons asking for a declaration to that effect.

Neville J. held that there was no agreement with regard to income tax which was obnoxious to the provisions of ss. 102 and 103 of the Act of 1842 and dismissed the summons.

Mrs. Brooke appealed.

Disturnal, K.C., and *A. M. Latter*, for the appellant. This is an annual payment payable as a charge on property of the person paying the same within s. 102 of the Income Tax Act, 1842, and Mrs. Brooke is entitled to deduct the income tax on it. The statements in the agreement that the 2500*l.* is to be " paid out of the annual net income after income tax on the whole income has been paid " and " without deducting income tax therefrom " are " utterly void " under s. 103 of that Act, which provides that the husband shall be bound to allow the deduction. The Crown is not represented in this case, for income tax has already been paid on the whole income and the Crown has nothing further to ask for. This is a deed entered into under s. 45 of the Divorce and Matrimonial Causes Act, 1857, and is an " agreement " within s. 103. It is the duty of Mrs. Brooke or of the trustees of the will to deduct the income tax on the 2500*l.*: *In re Sharp.* (1) The Legislature has said that it shall not be paid free of tax, and a contract to that effect is void: *Floyer* v. *Bankes* (2); *Attorney-General* v. *Shield* (3); *Warren* v. *Warren* (4); *In re Barry's Trusts* (5); *Blount* v. *Blount* (6); *Dalrymple* v. *Dalrymple* (7); *In re Sir Daniel Cooper's Estate* (8);

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(1) [1906] 1 Ch. 793.

(2) (1863) 32 L. J. (Ch.) 610; 11 W. R. 630.

(3) (1858) 3 H. & N. 834.

(4) (1895) 72 L. T. 628; 43 W. R. 490.

(5) [1906] 1 Ch. 768; [1906] 2 Ch. 358.

(6) [1916] 1 K. B. 230.

(7) (1902) 39 S. L. R. 348.

(8) (1911) 55 Sol. J. 522.

Shrewsbury v. *Shrewsbury* (1); *Frankfort* v. *Frankfort* (2); *London County Council* v. *Attorney-General* (3); *Gleadow* v. *Leetham.* (4)

Hon. Frank Russell, K.C., and *Bremner*, for the respondents. This deed operates as part of the order of the Court and according to the intention of the parties. The Court adopted it and made it part of its order. It is not within s. 102 at all. There is no sum charged. It is a direction to pay income to different persons in certain proportions. The parties intended that there should be a division of the actual net income. Sect. 102 applies only where the parties have made a charge on the gross income, not where the tax has already been paid. The cases cited by the appellant all referred to gross income.

Disturnal, K.C., in reply referred to *Conolan* v. *Leyland.* (5)

Cur. adv. vult.

June 27. The judgment of the COURT (Lord Cozens-Hardy M.R., Pickford L.J., and Warrington L.J.) was read by

WARRINGTON L.J. Under a deed dated June 14, 1912, the defendant, in the events which have happened, is entitled to receive out of certain annual net income (after income tax on the whole income has been paid) which would, but for the deed, be payable to the plaintiff a clear annual sum of 2500*l.* The plaintiff contends that, under the provisions of s. 102 of the Income Tax Act, 1842, there ought to be deducted from this annual sum the amount of the income tax thereon; and that, although the deed in terms provides that such payment is to be made "without deducting income tax therefrom," the deduction ought still to be made, this last provision being, as she maintains, "utterly void" under s. 103 of the same Act. The plaintiff issued an originating summons, asking in substance for a declaration giving effect to her contention. Neville J. has dismissed the summons, and the plaintiff appeals. As between the parties before us, it is to be assumed as common ground that the Crown has received all the tax it is entitled to. [His Lordship stated the facts and continued:]

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(1) (1906) 22 Times L. R. 598.

(2) (1845) 4 Notes of Cases, 280.

(3) [1901] A. C. 26, 38.

(4) (1882) 22 Ch. D. 269.

(5) (1884) 27 Ch. D. 632.

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On the construction of the deed we think it is clear that the income by clause 1 expressed to be charged is the same subject-matter as that which in clause 2 is described as "the income which would but for this direction be payable by them to the settlor," and in clause 3 as "the annual net income," namely, the income after deduction of the income tax. It seems to us to follow that, whether the defendant is for the time being entitled to a sum equal to one fourth of the net income or to a fixed sum of 2500*l*. payable thereout, he is entitled to a portion of a fund which represents the income after deduction of the tax. The fact is that at the present time one fourth of that fund is less than 2500*l*.; and the defendant is, accordingly, entitled under the deed to receive out of it 2500*l*. Is this sum to be reduced by the amount of income tax thereon? Under the deed itself clearly not. Even if the words "without deducting income tax thereon" had been omitted, we should have been of the same opinion. The sum in question is a part, not of taxable income, but of income from which the tax has already been deducted. But the insertion of those words removes all possible doubt as to the intention of the parties.

Then is the position affected by s. 102 and s. 103 of the Income Tax Act of 1842? The material parts of s. 102 are as follows: "And be it enacted, that upon all annuities, yearly interest of money, or other annual payments, whether such payments shall be payable within or out of Great Britain, either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half-yearly or at any shorter or more distant periods, there shall be charged for every twenty shillings of the annual amount thereof the sum of seven pence, without deduction, according to and under and subject to the provisions by which the duty in the third case of Schedule D may be charged; provided that in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act no assessment shall be made upon the person entitled to such annuity, interest, or other annual payment, but the whole of such profits or gains shall be charged with duty on the person liable to such annual payment, without distinguishing such annual payment, and the person so liable to make such annual payment, whether out of the profits or gains charged with duty, or out of any annual payment liable to deduction, or from which a deduction has been made, shall be authorised to deduct out of such annual payment at the rate of " so many pence " for every twenty shillings of the amount thereof, and the person to whom such payment liable to deduction is to be made shall allow such deduction, at the full rate of duty hereby directed to be charged, upon the receipt of the residue of such money, and under the penalty hereinafter contained, and the person charged to the said duties having made such deduction shall be acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable." Sect. 103, omitting what is immaterial, is as follows: " If any person shall refuse to allow any deduction authorised to be made by this Act out of any annuity or annual payment mentioned " in the next preceding clause " every such person shall forfeit the sum of fifty pounds; and all contracts, covenants, and agreements made or entered into, or to be made or entered into, for payment of any interest, rent, or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void." Sect. 102 is, as was pointed out by Lord Macnaghten in the case of *London County Council* v. *Attorney-General* (1), the charging section; and it is only to annual payments thereby charged that the provision as to deduction of income tax applies. Is the annual sum in this case within the charge? If it is, it must be because it comes within the description " annual payment payable as a charge on the property of any person paying the same." But when the entire section is looked at, we think it is clear that the property there referred to is property subject to tax, called in the proviso " profits or gains brought into charge by virtue of this Act," that is to say, income chargeable under each of the schedules—see *London County Council* v. *Attorney-General* (2)—or, to use an expression used by Lord Davey in the same case (3), " taxable income." We think that the annual sum in this case, not being payable out of taxable income, is not within the charge; and neither the proviso allowing deduction nor

(1) [1901] A. C. 26, 38.

(2) [1901] A. C. 26.

(3) [1901] A. C. 46.

the provision of s. 103 avoiding the exemption from tax applies to it.

So far we have expressed our opinion on the meaning of the section without reference to authority, except the expressions above referred to contained in the speeches of Lord Macnaghten and Lord Davey respectively in *London County Council* v. *Attorney-General.* (1) We think, however, that this view is supported by the judgment of Sir H. Jenner Fust in *Frankfort* v. *Frankfort.* (2) In that case a wife had been allowed a fixed annual sum by way of alimony upon a calculation of the husband's income, in which calculation income tax had been treated as deducted. The husband claimed under s. 102 to deduct income tax from the annual sum, but his claim was disallowed. The learned judge sums up his views in the following passage: "I am clearly of opinion, upon the general principle, as well as upon the construction of the Act,—the husband having deducted the tax upon the whole of his property, and the allotment to the wife having been made after the deduction, that is, upon his net income,—he has already had the benefit of the deduction." As to the cases cited by the appellant—namely, *Warren* v. *Warren* (3), *Floyer* v. *Bankes* (4), *Attorney-General* v. *Shield* (5), *In re Barry's Trusts* (6), and *Blount* v. *Blount* (7)—they were all cases either of annuities charged upon gross income before deduction of tax or secured by personal covenant or obligation and therefore clearly within s. 102.

On the whole we are of opinion that the annual sum in this case is not within the section, that the order of Neville J. was right, and that this appeal ought to be dismissed with costs.

Solicitors for appellant: *Nicholson, Patterson & Freeland.*
Solicitors for respondents: *Capron & Co.*

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(1) [1901] A. C. 38, 46.

(2) 4 Notes of Cases, 280, 284.

(3) 43 W. R. 490.

(4) 11 W. R. 630.

(5) 3 H. & N. 834.

(6) [1906] 1 Ch. 768; [1906] 2 Ch. 358.

(7) [1916] 1 K. B. 230.

H. C. R.

COLEMAN *v.* LONDON COUNTY AND WESTMINSTER BANK, LIMITED.

NEVILLE J.
1916
June 8, 9.

[1915 C. 1378.]

Mortgage—Settlement of Debentures—Transfer to Settlement Trustee—Non-registration of Transfer—Negligence of Trustee—Settlor's subsequent Equitable Mortgage by Deposit—Purchaser for Value without Notice—Claim by Beneficiary—Priorities.

In 1893 forty-five debentures of a limited company secured by a trust deed were settled by the registered owner upon trusts for herself for life, with remainder to her three sons in equal shares, and she executed a deed of transfer of the debentures to C., who was the sole trustee of the settlement, and he had possession of the transfer and of the debentures, but he did not register his transfer in the books of the company. He was also the sole trustee of the debenture trust deed. In 1894 one of the sons assigned his one-third share, or fifteen of the debentures, to F. for value.

In 1911 the settlor, who was a director of the company and in some way then had possession of the forty-five debentures, deposited them with the bankers of the company as security for the company's overdraft and signed the usual declaration of charge. Before taking the charge the bank ascertained that the settlor was the registered owner of the debentures in the books of the company. The bank gave notice of their charge to C., as the trustee of the debenture trust deed, which he acknowledged, but made no reference to the settlement.

In 1914, after C.'s death, the bank first had notice of the settlement and of C.'s deed of transfer, and they at once took a transfer of the forty-five debentures from the settlor and were registered as the owners in the books of the company. In an action by F. and the executors of C. claiming fifteen of the debentures in priority to the bank:—

Held, that neither C.'s omission to register his transfer nor his silence when he received notice of the bank's charge estopped the plaintiffs from asserting their title; and also that F.'s assignment, being prior in date to the bank's charge, was the better in equity.

THIS was an action which raised a question of priorities under these circumstances.

In March, 1893, a private company, called T. W. Coleman, Limited, was formed to acquire the business of T. W. Coleman, deceased, under whose will his widow, Annie Coleman, and his three sons were interested in the property. Part of the consideration paid by the company for the property was forty-five debentures of 100*l.* each of the company, secured by a usual debenture trust deed dated April 1, 1893, of which Edward Coleman was the sole trustee. The debentures were issued to Annie Coleman, who by deed dated April 6, 1893, made in pursuance of a family arrangement, settled them upon trusts for herself for life, with remainder to her three sons in equal shares. At the same time she executed a deed of transfer of the debentures to Edward Coleman, who was the sole trustee of the settlement, and this transfer and the debentures came into his possession as such trustee, but he did not register the transfer in the books of the company. Annie Coleman and her three sons were the directors of the company.

In January, 1894, E. H. Coleman, one of the sons, assigned for value all his personal property, which included his one-third share, or fifteen of the said debentures, to his wife Florence Coleman, and thereafter ceased to be a director of or to be connected with the company.

In 1908 the debentures were returned to the company to be restamped and reissued, and in 1911 Annie Coleman, who in some way then had possession of the forty-five debentures, deposited them with the defendants, the bankers of the company, as security for the company's overdraft, and signed the usual memorandum of charge and declaration of trust of the debentures in favour of the bank. Before taking the charge the bank caused the company's register of debentures to be inspected and ascertained that Annie Coleman was the registered owner of the debentures. The bank had in their possession a tin box, labelled "T. W. Coleman, Limited," deposited with them for safe custody by the company and containing documents of the company, but the bank did not know the contents of the box and had not a key of it.

On June 19, 1913, the bank gave written notice of their charge to Edward Coleman, as the trustee of the debenture trust deed of April 1, 1893, which he formally acknowledged by return of post. In September, 1913, he died. On January 5, 1914, the company by resolution appointed Mr. Morris, the manager of the bank, trustee of the debenture trust deed in the place of Edward Coleman. For the purposes of his appointment Mr. Morris was given the key of the tin box and examined its contents, and among the documents found the settlement of April 6, 1893, and Annie Coleman's deed of transfer of the debentures to Edward Coleman. This was the first notice to the bank of the existence of these two documents. They at once took a transfer of the debentures from Annie Coleman under their charge and registered their transfer in the books of the company, and also obtained from the two sons (the directors of the company) an assignment of their respective reversionary interests under the settlement. In February, 1914, Annie Coleman died.

In 1915 Florence Coleman and the executors of Edward Coleman brought this action against the bank, claiming a declaration that the bank had no title to the fifteen debentures and an order that the bank should hand over and transfer such debentures to them. The bank by their defence did not admit the plaintiffs' title, and pleaded the negligence of Edward Coleman in not registering his deed of transfer in the debenture register of the company, and his non-disclosure to the bank of the existence of the settlement and his deed of transfer when he received notice of their charge. Fraud was not suggested on the part of any of the parties.

Ward Coldridge, K.C., and *Harman*, for the plaintiffs. Annie Coleman by her settlement and transfer of the debentures divested herself of all her interest and property in the debentures, and Edward Coleman became and was the legal owner of them. Therefore her subsequent charge and transfer to the bank were inoperative and passed nothing to them. If it is a question of equities, the equity of the plaintiffs under the settlement is superior to the equity of the bank. It is for them to establish that they have a better equity.

Jenkins, K.C., and *J. S. Green*, for the bank. We admit that the plaintiff Florence Coleman was a purchaser for value of the equitable interest of E. H. Coleman in one-third of the forty-five debentures, and that in an ordinary case the equity of a cestui que trust prevails, but it is necessary in this case to consider the form and custody of the debentures. The form of each debenture is that the company covenants to pay the named person "or the registered holder for the time being," and the charge is in the debenture trust deed. The conditions indorsed on the debenture provide that the company shall keep an accurate register of the debenture-holders and of all subsequent debenture-holders, and both the debt and the charge are in favour of the registered holder for the time being. Therefore Edward Coleman could not sue the company as a debenture-holder unless he was on the register, and until his name was on the register his title was not complete. But instead of completing his title he allowed his title deeds, the debentures, to remain either in the possession of Annie Coleman, the registered owner, or under the control of the company, and it was his negligence that enabled them to deal with the debentures as the apparent owners and to pledge them with the bank, who made every reasonable inquiry and inspected the register. Then when the bank gave him notice of their charge he remained silent. If he were suing the bank in trover for the debentures he would be estopped, and it is submitted that the plaintiffs, his legal personal representatives, are in no better position. Then the question is whether the plaintiff Florence Coleman is in a better position. It is submitted that she is not. The material point is the custody of the debentures, and the onus is on the plaintiffs to show that Edward Coleman really got control of them as the trustee of the settlement. We say the true inference from the evidence is that he did not, and that the principle of *Lloyds Banking Co.* v. *Jones* (1) and *Walker* v. *Linom* (2), in which a prior legal estate was postponed to a subsequent equitable interest, applies. She apparently never gave Edward Coleman notice of her assignment, and when the bank on January 6, 1914, gave the plaintiffs notice that they intended to have the debentures registered in the bank's name no objection was raised. If Annie Coleman could give us the legal estate, we have got it. The legal title here was not complete until registration of the transfer, and we come within *Taylor* v. *Russell.* (3)

Ward Coldridge, K.C., in reply. The property in the debentures was legally and properly vested in Edward Coleman by his deed of transfer. At that date he had an absolute present right to have the debentures registered in his name. As between him and Mrs. Coleman the transaction was complete, and all that remained to be done was a ministerial act by the company which they could not refuse to do. *Walker* v. *Linom* (4) is really in our favour. It is submitted that Edward Coleman could have brought an action for

(1) (1885) 29 Ch. D. 221.
(2) [1907] 2 Ch. 104, 118.
(3) [1892] A. C. 244.
(4) [1907] 2 Ch. 104.

trover against the bank for the debentures. It is impossible to say that a cestui que trust is bound by every omission or negligent act of his trustee. The bank obtained no priority by taking their transfer after notice of the settlement: *Dodds* v. *Hills* (1); *Northern Counties of England Fire Insurance Co.* v. *Whipp* (2); *Shropshire Union Railways and Canal Co.* v. *Reg.* (3); *Société Générale de Paris* v. *Walker* (4); *Taylor* v. *Russell* (5); *Powell* v. *London and Provincial Bank* (6); *Ward* v. *Duncombe.* (7)

NEVILLE J. This is a case of some complexity. The facts are these: [His Lordship stated the facts and continued:] It is to be observed that the bank gave their notice to Edward Coleman as the trustee under the debenture trust deed. Why that should have been supposed to be necessary or advantageous I do not know, but it is clear that on June 19, 1913, he became aware of the fact that two years previously, on April 11, 1911, Annie Coleman had deposited the debentures as security with the bank. Obviously that must have shown him that the transaction was wrong, because he was the trustee of the debentures for her for life with remainder to her sons, and, however she had obtained possession of them, she clearly had no right to deal with them as she did. For some reason which we cannot now fathom—I am clear there was no fraud about the matter on any one's part—he apparently got confused or must have forgotten that what was being done was inconsistent with the trusts of the settlement of which he was trustee. The position of affairs then was this. On April 6, 1893, the same date as the settlement, Annie Coleman had executed a transfer of the debentures to Edward Coleman, but that transfer had unfortunately never been registered, and on January 20, 1894, one of the sons, E. H. Coleman, had transferred his interest under the settlement to Florence Coleman, one of the plaintiffs. The consequence was that, although apparently Annie Coleman and her two sons, who were then the three directors of the company, knew what was being done with the

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(1) (1865) 2 H. & M. 424.
(2) (1884) 26 Ch. D. 482.
(3) (1875) L. R. 7 H. L. 496.
(4) (1885) 11 App. Cas. 20.
(5) [1892] A. C. 244.
(6) [1893] 2 Ch. 555.
(7) [1893] A. C. 369.

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debentures and no doubt agreed to it, they appear to have forgotten, or at all events paid no heed to the fact, that one of the cestuis que trust was the wife of their brother, who had gone away and ceased to be connected with the company, and no communication of any sort or kind seems to have been made to him. Matters remained in that position until January 5, 1914, when one of the officials of the bank, Mr. Morris, who had been appointed after Edward Coleman's death trustee for the debenture-holders, opened a box which had been delivered to the bank for safe custody by the company, and in that box, which was marked with the name of the company, and was undoubtedly held by the bank on account of the company for safe custody, the bank found the settlement, and then for the first time had notice of the trust. The bank are entirely free from blame in the matter. When they took the deposit and custody of the debentures from Annie Coleman they inspected the register and found that she appeared to be the registered owner of the debentures, and until they got this notice they had no reason to doubt that the transaction with them was perfectly straightforward. Subsequent to that notice they obtained a transfer from Annie Coleman; but this they knew was a second transfer, a transfer having been already made under the settlement, and they subsequently succeeded in getting the company to register that second transfer. It appears to me that second transfer can make no difference to the rights of the parties. I think that from the date of the execution of the transfer in 1893 Edward Coleman, as the trustee of the settlement, had the right to have his transfer registered if he had applied for it to the company. I do not think that the company was in a position to register anybody but the true owner, and I think further that the bank got nothing under their transfer from Annie Coleman. On both these grounds I think their position was not improved by the transaction that took place after they had notice of the settlement. Therefore the rights of the parties are to be ascertained as on January 5, 1914, after discovery of the existence of the settlement. Were the bank then entitled to the interest of the plaintiffs? They took, no doubt, the interest of the other two sons—there is no doubt about that; but had they any right as against the interests of the plaintiffs?

Now first of all the question arises as between the bank and the trustee, and there the case is certainly one of some difficulty, because the facts are rather peculiar. Nothing, I think, can be alleged against Edward Coleman until the receipt of the bank's notice in 1913, and then undoubtedly he did get notice of the transaction of 1911, and it is said that, as between himself and the bank, his silence on that occasion prevents his recovering, as trustee for the plaintiff Florence Coleman, her share of the debentures under the settlement. I think the only defence in an action brought by him after he had obtained registration of himself as the owner of the debentures, which registration he could have called upon the company to effect at any time, would have been in this way: he would have been in a position to sue the bank for the debentures, and unless they could have relied upon estoppel—such estoppel as is illustrated by the case of *Pickard* v. *Sears* (1)—they would have had no defence to the action; but I do not think that his silence on being informed of the transaction two years old would have been enough to enable them to establish an estoppel against him in such an action. I think, therefore, that defence would not entitle the defendants to succeed in the present action. But the case does not really rest there, because the beneficiary is a co-plaintiff, and the question to be considered is whether, even supposing the representatives of the trustee themselves are unable to recover against the defendants, the beneficiary is entitled to recover. It is said she cannot because her title can be no higher than that of the trustee: therefore, if I am wrong in thinking the trustee could succeed, she cannot succeed any better, and reliance for that proposition is placed upon two cases, one of them being a decision of Pearson J. in *Lloyds Banking Co.* v. *Jones.* (2) In that case the title deeds of certain property had been from the first out of the possession of the trustees, with the result that a subsequent equity was created. The question was whether the legal estate of the trustee and the right of the cestui que trust could be preferred to that equity. The facts are only material owing to a subsequent decision by Parker J.; but there is one very material passage in the judgment of Pearson J. which has to be considered. The learned judge says (3): "The question is, whether, under the circumstances, the bank are entitled,

(1) (1837) 6 Ad. & E. 469.
(2) 29 Ch. D. 221.
(3) 29 Ch. D. 227.

although they are only equitable mortgagees, to priority over the legal estate vested in the trustees of the settlement. It is said that the infant defendant has a better equity than the trustee has. I demur to that proposition entirely. I think I should be introducing a most fatal doctrine if I were to say that, when the legal estate in property is vested in a trustee under a marriage settlement, the simple fact that his cestuis que trust are ignorant of what he is doing gives them a prior equity over any person who has dealings with him, and who is equally ignorant of the existence of the settlement and of the rights of the cestuis que trust." I should have thought that the learned judge had been misreported there, and that he could not have used the words attributed to him, but, inasmuch as Parker J. has subsequently recognized them in a case to which I am going to refer, I think I must take it that the proposition is intended to stand in the terms in which we find it. I can only say that read literally it appears to me to be in conflict with authority, and that it gives the go-by to many decisions in which it has been held that, as between two equitable owners, one equitable owner taking under a settlement and the other equitable owner taking in breach of the trusts of the settlement, although the trustee of the settlement himself could not recover against the owner of the equitable interest which he has created, that does not stand in the way of a cestui que trust asserting his right supposing there is nothing to make the equity of the second taker superior to that of the first. An authority for that proposition is *Shropshire Union Railways and Canal Co.* v. *Reg.* (1) It is to be borne in mind that the case decided by Pearson J. was a case in which the title deeds had been out of the hands of the trustee from the first; he had not got possession of them. The case of *Lloyds Banking Co.* v. *Jones* (2) was considered in *Walker* v. *Linom* (3) by Parker J., as he then was. The learned judge goes at great length through the cases and he distinguishes, and as I understand justifies, the decision of Pearson J. on the ground which is not referred to in the judgment of Pearson J., that it was a case where the deeds had never been in the hands of the trustee at all, but had been left in the hands of a third party, and, the same circumstances arising again in the case of *Walker* v. *Linom* (1), the learned judge considers the matter and follows, as I understand it, the decision of Pearson J., taking it to be a decision that there is a distinction between the cases where the trustees are not originally put in possession of the title deeds and the cases where, having the title deeds, they proceed to misuse them and create an equitable title afterwards. I do not suggest for a moment the case before the learned judge was not itself correctly decided, but with regard to the general observations of the learned judge on pp. 118 and 119, speaking with the greatest possible respect, it seems to me that once the trust is accepted and the property conveyed to the trustee, the trustee, and the trustee alone, is the owner of the deeds. Nobody but the trustee can recover them, and should a cestui que trust try to get them, he or she must fail because of the existence of the trusteeship. Any attempt to set up a title against the trustee must inevitably fail. That, it seems to me, is only another way of saying that the trustee is trustee of those deeds : he can get them, and when he gets them he has to hold them for the benefit of the cestuis que trust. But, whether that be so or not, there is a broad distinction between the cases I have cited and the case which I have to decide. Here I think that at any moment Edward Coleman, the trustee, and he alone, could have obtained registration in his own name, and that the plaintiff cestui que trust is quite free from any act done or omitted to be done which could raise an equity against her. She is prior in point of time to the bank, and I can see no ground upon which the equity of the bank can be said to be a better equity than hers. I do not think that the trustee's omission to obtain registration of his transfer stands at all upon the same footing as allowing deeds to remain in the hands of third persons after the execution of the trust. It seems to me there is a distinction between the two cases, and I therefore come to the conclusion the rule applies that the equity first in time prevails over the later equity, except in cases where the later equity is the better one. The second equity is not the better one here, and I am therefore of opinion that the plaintiffs are entitled to succeed. There will be a declaration in the terms asked for by the statement of claim, and the fifteen debentures can be handed over either to the plaintiffs, the representatives of Edward Coleman, or with their consent to their co-plaintiff, Florence Coleman.

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(1) L. R. 7 H. L. 496.
(2) 29 Ch. D. 221.
(3) [1907] 2 Ch. 104.

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(1) [1907] 2 Ch. 104.

Solicitors for plaintiffs: *Chester, Broome & Co., for Conquest, Clare, & Binns, Bedford.*

Solicitors for defendants: *Harman & Son, for H. F. Bennett, Banbury.*

H. L. F.

C. A.
1916
May 25, 26.

In re TIMSON.
SMILES *v.* TIMSON.

[1915 T. 1048.]

Will—Construction—"Issue"—"Parent."

Testatrix gave her residuary estate subject to a life interest to five named nephews and nieces, and directed that, if any of them should die in the lifetime of the tenant for life leaving lawful "issue," such issue should take the share which his, her, or their deceased "parent" would have taken if living; but if any of them should die in the lifetime of the tenant for life without leaving "issue" him or her surviving, the share of the one so dying should be divided amongst the survivor or survivors and the "issue" of him, her, or them so dying and leaving issue:—

Held, affirming the decision of Younger J. [1916] 1 Ch. 293, that the word "issue" in each branch of the clause must be confined to children.

Sibley v. *Perry* (1802) 7 Ves. 522 applied.

Ross v. *Ross* (1855) 20 Beav. 645, *Ralph* v. *Carrick* (1879) 11 Ch. D. 873, and *In re Embury* (1913) 109 L.T. 511 distinguished.

APPEAL from a decision of Younger J. (1)

Frances Anna Timson, who died in 1889, by her will, dated April 1, 1858, gave her residuary estate to trustees in trust to pay the income to her nephew W. W. A. Lukin during his life, and after his death to his wife, Blanche Lukin, during her life, and after the death of the survivor upon trusts in favour of the children of W. W. A. Lukin as therein mentioned, and in default of children (which happened) bequeathed her residuary estate unto five nephews and nieces by name in equal shares; "and if all or any or either of my said nephews and nieces shall die in the lifetime of my said nephew, W. W. A. Lukin, and Blanche Lukin, or in the lifetime of the survivor of them, leaving lawful issue, then I direct that such issue shall take the share or shares which his her or their deceased parent would have taken if living; but if any or either of my said nephews and nieces shall die in the lifetime of the said W. W. A. Lukin and Blanche Lukin, or in the lifetime of the survivor of them, without leaving lawful issue him or her surviving, then I direct that the share or shares of him or her so dying shall go and be divided amongst the survivor or survivors of my said nephews and nieces and the issue of him her or them so dying and leaving issue as aforesaid." W. W. A. Lukin survived his wife Blanche and died without issue in 1914. The five named nephews and nieces of the testatrix were all then dead, having left children and grandchildren amounting to upwards of sixty persons.

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(1) [1916] 1 Ch. 293.

An originating summons was taken out by the trustees raising (inter alia) the questions whether the expression "lawful issue" in the above clause was restricted to children or whether it included also remoter descendants, and if so, then whether the issue of all degrees took together per capita or whether they took per stirpes; and in either case whether the persons described as "lawful issue" took as joint tenants or as tenants in common.

Younger J. held, applying the rule in *Sibley* v. *Perry* (1), that the word "issue" in each branch of the clause must be confined to children.

The case now came before the Court on an appeal by Sybil Etonia Bruce, a grandchild of one of the nieces, who was not represented at the hearing before Younger J.

Maugham, K.C., and *Crossfield*, for the appellant. The meaning of the word "issue" in this will is not confined to children of the named nephews and nieces. Prima facie the word includes all descendants. The direction that the issue shall take their parent's share is against our contention, but the word "parent" may be used in a sliding sense as referring to successive generations. It has a secondary meaning which goes beyond "father" and "mother":

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(1) 7 Ves. 522.

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Oxford English Dictionary. The word "issue" must be construed in its ordinary sense as including all descendants unless there is something in the will against that construction. If "issue" be confined to children, then in the event of the death of all the nephews and nieces leaving grandchildren only there would be an intestacy. The question here is whether this case is governed by the rule in *Sibley* v. *Perry* (1) and *Pruen* v. *Osborne* (2), or falls within *Ross* v. *Ross* (3) and *Ralph* v. *Carrick* (4), where the view was strongly expressed that *Sibley* v. *Perry* (1) might be stated too highly as laying down a rule.

The testatrix used the words "lawful issue" here because she wished to exhaust the stock of the nephews and nieces before benefiting any one else. There is a reasonably clear intention that "issue" should have its ordinary meaning. [They also referred to *Robinson* v. *Sykes* (5), *In re Orton's Trust* (6), *Martin* v. *Holgate* (7), *In re Rawlinson* (8), *In re Embury* (9), *In re Johnson* (10), and *Birdsall* v. *York.* (11)]

[LORD COZENS-HARDY M.R. referred to *Harrington* v. *Lawrence.* (12)]

Cunliffe, K.C., and *E. Beaumont*, for children of the nephews and nieces. The decision appealed from is right. The word "issue" in each branch of the clause must be confined to children. Younger J. was justified in putting the same construction upon the word in both cases. When a word occurs twice or more often in the same instrument it should, unless there appear a clear intention to the contrary, have the same meaning given to it throughout: *Ridgeway* v. *Munkittrick.* (13) The rule in *Sibley* v. *Perry* (1) is sound and effective and decisive of this case: see Hawkins on Wills, 2nd ed. p. 117. There is no context here to take the case out of that rule. In *Ross* v. *Ross* (3) and the other cases relied on for the appellant there was a direct gift to the issue; there is none here. In *Ralph* v. *Carrick* (4) the word "descendants" was used and all that was said there as to "issue" was mere dictum. [They also referred to Jarman on Wills, 6th ed. p. 1598.]

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(1) 7 Ves. 522.
(2) (1840) 11 Sim. 132.
(3) 20 Beav. 645.
(4) 11 Ch. D. 873.
(5) (1856) 23 Beav. 40, 51.
(6) (1866) L. R. 3 Eq. 375.
(7) (1866) L. R. 1 H. L. 175.
(8) [1909] 2 Ch. 36.
(9) 109 L. T. 511.
(10) (1914) 111 L. T. 130.
(11) (1859) 5 Jur. (N.S.) 1237.
(12) (1814) Unreported, but referred to in 11 Sim. 138.
(13) (1841) 1 D. & War. 84, 93.

E. A. Jennings, for another child, supported the same argument.

Eastwood, for the trustees.

Maugham, K.C., in reply.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Younger J. I entirely agree with counsel that this will is by no means easy to construe. The testatrix survived the date of her will for many years, and nearly sixty years have elapsed between the date of her will and the period of distribution, the result being that a great many of the persons named in her will have died; and the question is whether under the language which she has used any persons can claim except the children of the nephews and nieces mentioned. The scheme of the will is this: [The Master of the Rolls then referred to the provisions of the will and continued:] There has been a discussion as to the principle which ought to govern us in construing a will of this kind and the extent to which what is well known in the text-books as the rule in *Sibley* v. *Perry* (1) or in *Pruen* v. *Osborne* (2) should be adopted. That rule seems to me to govern the case unless there is some context which enables us to take a different view. But in saying that I do not mean that the Court must rely solely upon that rule; regard must be had to the whole will. It is a fallacy to say: "Look at *Sibley* v. *Perry* (1)—that is a prima facie rule—and see whether there is anything to cut it down." We must consider the whole will. What the learned judge has done is, it seems to me, to take the clause which comes first, which has the advantage of being rather easy to construe, and then he has proceeded to construe the second. The rule in *Sibley* v. *Perry* (1) is stated very accurately in these words: "It is an established rule that where the parent of issue is spoken of, the word 'issue' is prima facie restricted to children of the parent." That seems to me to be perfectly good sense and establishes a guide to some extent. It is quite true that Brett L.J. in *Ralph* v. *Carrick* (3) said he should be happy to attend the funeral of *Sibley* v. *Perry* (1), but I am not one of those who would like to follow that funeral. I think it is a good rule, although, like all other rules of the kind, its application may be cut down by the context of the will.

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(1) 7 Ves. 522.

(2) 11 Sim. 132.

(3) 11 Ch. D. 873, 884.

Now I take the first clause in the will. In the event of all the five nephews or nieces dying before the period of distribution leaving lawful issue the testatrix directs that "such issue shall take the share or shares which his her or their deceased parent would have taken if living." That comes exactly within *Sibley* v. *Perry* (1) unless there is something in the context to take it out. But apart from that rule there are the words "the share or shares which his her or their deceased parent would have taken if living." Under those words the child of a nephew or niece who survived the period of distribution would have taken, but a grandchild would not. Reading that clause it seems to me that there is an indication, a reasonably plain indication, that the only issue who could take would be the children and not the grandchildren.

But then it is said the word "issue" must be read as having the same meaning in the two alternatives—death leaving issue and death without leaving issue. The will proceeds: "but if any or either of my said nephews and nieces shall die" before the period of distribution "without leaving lawful issue him or her surviving, then I direct that the share or shares of him or her so dying shall go and be divided amongst the survivor or survivors of my said nephews and nieces and the issue of him her or them so dying and leaving issue as aforesaid." It is said that, taking that clause alone, there is no ground for cutting down the generality of the word "issue." You cannot without exercising some ingenuity reconcile the two clauses, but they must be reconciled in some way, and I think the easiest way to do it is to say that "issue" in this will means children of the first generation, or in other words children only. That is the view which Younger J. has taken; he has discussed the various authorities and pointed out that in the cases of *Ross* v. *Ross* (2) and *Ralph* v. *Carrick* (3) there was a distinct context which justified the Court in disregarding the general rule of *Sibley* v. *Perry*. (1) I can find no such context here.

Nor do I think it is sufficient to say that the construction which

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(1) 7 Ves. 522.

(2) 20 Beav. 645.

(3) 11 Ch. D. 873.

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the learned judge put upon this will may involve an intestacy. That may be so; that is a difficulty in the case, but it does not, in my view, suffice to induce us to depart from the view which Younger J. has taken, which, apart from that consideration, seems to me to be right.

In my opinion the appeal fails.

PICKFORD L.J. I am of the same opinion, and I am content to adopt the judgment of Younger J. I would only add that I do not think his judgment is open to the criticism that has been pointed out, that he isolated one part of the will and came to a conclusion as to what that meant by itself and then said the rest of the will must be construed in the same way. I do not think he did or intended to do that. I think he came to his conclusion (with which I agree) upon a consideration of the whole will. I think that as it was necessary to consider one clause first he began with that which came first, but I do not think that makes his judgment open to the criticism that he applied a wrong principle by isolating one clause and interpreting that, and then applying that interpretation to the rest of the will.

NEVILLE J. I agree.

Solicitors: *Valpy, Peckham & Chaplin; Wigan, Champernowne & Prescott; E. F. & H. Landon.*

G. A. S.

C. A.
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June 23, 27.

In re SMITH.
PRADA *v.* VANDROY.

[1915 S. 3538.]

Will—Construction—Provision against Lapse by Death of "Legatee"—Bequest by Codicil—"This my will."

Testatrix by her will made in 1894 gave a number of specific and pecuniary legacies and disposed of her residuary personal estate, and directed that all bequests and legacies given to married women should be for their separate use, and that "no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." The testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will and any previous codicil or codicils, and died in 1915:—

Held, affirming the decision of Sargant J. [1916] 1 Ch. 523, that the provision in the will against lapse extended to a bequest contained in a codicil of a leasehold house to W. H. H., who predeceased the testatrix; the expression "this my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will and codicils at the date of the testatrix's death.

Appeal from Sargant J. (1)

Juliana Smith by her will dated June 6, 1894, gave a number of specific legacies to her cousins, including her cousin Marie Vandroy. She then gave a number of pecuniary legacies and bequeathed to three persons the moiety belonging to the testatrix of certain leasehold premises in Deal, and also the sum of 150*l.* to enable them to acquire the remaining moiety of the same premises (which formerly belonged to the testatrix's brother) from the residuary legatees under the will of her said brother. She then directed her executors to sell and convert her estate not specifically bequeathed and to pay thereout her debts, funeral and testamentary expenses, and the said pecuniary legacies; and as to all the rest and residue of her estate after the aforesaid payments gave and bequeathed the same unto her said cousin Marie Vandroy absolutely, and continued: "I declare that all bequests and legacies given to married women shall be for their respective separate use and may be paid to them on their receipt alone and without the concurrence or assent of their husbands and notwithstanding their dissent. And I declare that no legacy given by this my will shall lapse by reason of the death of the legatee before me but that the same shall take effect as if the death of such legatee had happened immediately after my death and such legacy shall accordingly pass to the legal personal representative of such legatee."

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(1) [1916] 1 Ch. 523.

The testatrix made seven codicils to her will, the following statement of which is taken from Sargant J.'s written judgment:—

"A first codicil dated in 1895 gives additional pecuniary legacies to two legatees named in the will and a specific legacy to a fresh legatee, and further declares that a specific legacy and a pecuniary legacy of 150*l.* given to three legatees named in the will are to be taken by them as tenants in common, and further declares that all legacies and bequests given by her will or by her codicil shall be free of duty.

"A second codicil dated in 1897 gives a legatee named in the will a larger legacy by way of substitution.

"A third codicil dated in 1898 revokes the appointment of one of the executors named in the will and a legacy of 50*l.* thereby given to him and appoints another person executor and gives him a legacy of 50*l.*

"A fourth codicil dated in 1900 substitutes for the legacy of 150*l.* given to the three legatees before referred to a legacy of 300*l.*, but declares that if either of the legatees should predecease the testatrix their specific legacy and the increased legacy of 300*l.* shall go to the survivors or survivor. The same codicil also substitutes a larger legacy for that previously given in the case of another pecuniary legatee.

"A fifth codicil dated in 1906 is entirely devoted to revoking numerous specific and pecuniary legacies given by the will, probably because the legatees had already predeceased the testatrix.

"A sixth codicil dated in November, 1908, appoints a new executor in the place of both the executors whose appointment was revoked by the third codicil and of the executor who had been appointed by the third codicil, both of whom are mentioned in this codicil as being dead. It further revokes the legacy to the latter of 50*l.* and makes a specific gift to the testatrix's cousin W. H. Hayman of certain chattels she had marked as given to him.

"A seventh codicil dated in December, 1908, bequeaths to a Mr. Eldridge certain articles and pictures which the testatrix has marked as given to or for him, and in the event of his dying before the testatrix bequeaths the same to his daughter Beatrice May Eldridge. It then makes a specific bequest to the testatrix's servant Ellen Swann, who had taken other benefits under the will and previous codicils. It then—and this is the bequest in question—bequeaths to Mr. W. H. Hayman 'my leasehold house, No. 55, Oakley Square, and all the contents thereof except the silver plate and except such pictures and articles as I have by my said will or any codicil thereto otherwise disposed of or which I may hereafter dispose of.' Each codicil contains an express formal clause confirming in all other respects the testatrix's will and any previous codicil or codicils, mentioning indeed in each case after the first the exact number of the previous codicils."

The testatrix died in 1915, aged ninety-nine years. Many of her legatees, including Marie Vandroy, the residuary legatee, and Mr. W. H. Hayman, died in her lifetime.

Sargant J. held that (1.) the provision in the will against lapse by the death of the "legatee" in the lifetime of the testatrix applied to the case of the death of the residuary legatee, and (2.) to the case of the bequest of the leasehold house and the contents made by the seventh codicil.

The administrator of the residuary legatee appealed on the second question.

Maugham, K.C., and *W. H. Draper*, for the appellant. In this will the expression "this my will" means "this document which I have now before me"—"this paper": *Bonner* v. *Bonner* (1); *Henwood* v. *Overend* (2); *Rose* v. *Cunynghame* (3); *Early* v. *Benbow.* (4) It is guessing to say that the expression extends beyond the particular instrument. The confirmation of the will by the codicil does not affect the question. Confirmation does not alter the will in any respect. When once the meaning of the expression

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(1) (1807) 13 Ves. 379.
(2) (1815) 1 Mer. 23.
(3) (1805) 12 Ves. 29.
(4) (1846) 2 Coll. 342.

"this my will" is determined it cannot be altered by confirmation: *Hopwood* v. *Hopwood* (1); *Macdonald* v. *Irvine*. (2)

Assuming that the true construction of the will must be ascertained without reference to the codicils, the legacies given by "this my will" mean the legacies previously given by the will itself, i.e., the legacies "hereinbefore" given. There is nothing in the codicils to give the expression an extended meaning. [*In re Trinder* (3) was also referred to.]

Tomlin, K.C., and *Darlington*, for the respondents, the executors of W. H. Hayman. A reference to a will includes a reference to all a man's testamentary instruments: *Green* v. *Tribe*. (4) It is not suggested that confirmation alters the construction of the will. The particular direction must be considered. Here it was intended to be applied quite generally: *Lemage* v. *Goodban*. (5) We rely also on *Byne* v. *Currey* (6) and *In re Sealy* (7), where *Byne* v. *Currey* (6) and *Early* v. *Benbow* (8) were discussed. Therefore the representatives of W. H. Hayman take the house and its contents given by the seventh codicil although he died before the testatrix.

Percy Wheeler, for the trustees.

Maugham, K.C., in reply, referred to *Jauncey* v. *Attorney-General*. (9)

LORD COZENS-HARDY M.R. This is an appeal from the judgment of Sargant J. as to the construction of certain words in a will. It raises a somewhat interesting point, and I will say at once that I do not intend to lay down any general rule of construction which is to be applicable to all other wills. I cannot, of course, prevent people from citing the decision in this case, or in any other case, but I certainly do not mean to apply the proposition which I was asked by counsel to apply, that the prima facie meaning of "this my will" is "this my testament" rather than "this my instrument." I prefer to approach this case from the view that it is my duty to construe all the instruments which have been admitted to probate and to take any indication that I can find as to what the

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(1) (1859) 7 H. L. C. 728.

(2) (1877) 8 Ch. D. 101, 108.

(3) (1911) 56 Sol. J. 74.

(4) (1878) 9 Ch. D. 231, 234.

(5) (1865) L. R. 1 P. & M. 57.

(6) (1834) 2 Cr. & M. 603, 607.

(7) (1901) 85 L. T. 451.

(8) 2 Coll. 342.

(9) (1861) 3 Giff. 308.

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meaning of the language used is. It is quite certain that "will" is a word which has, or may have, two meanings. Lord Hardwicke in *Fuller* v. *Hooper* (1) puts it quite clearly, that a will means in one sense all the testamentary documents by which the testator's property is disposed of; and another meaning is not that, but that it is an instrument called a will irrespective of any codicils which may subsequently be made. One of the questions here is in which of those two senses the word is used. The will is the will of a lady, and by her will, using the word at the moment as meaning instrument, she gave a great number of legacies to servants, to cousins, and to other people; and then we come to this, which is the first of the four clauses in the will: "I direct my executors hereinafter named to sell and convert into money the whole of my estate and effects not herein-before specifically bequeathed"—that would include real estate of course —"and to pay thereout my just debts funeral and testamentary expenses and the said pecuniary legacies" —the "said pecuniary legacies" are the pecuniary legacies in the earlier part of the will—"And as to all the rest and residue of my estate after the aforesaid payments I give and bequeath the same unto my said cousin Marie Vandroy absolutely."

Now, what is the construction and effect of that in a case where the testatrix subsequently made a number of codicils giving a number of legacies? Is it not quite clear that those subsequent legacies are under the language of the trust which I have read chargeable upon and payable out of the real estate, and must not the will be considered to have that effect? Mr. Maugham does not dispute that. In *Jauncey* v. *Attorney-General* (2) the testator gave his residuary estate to his trustees on trust to sell and thereout to pay his debts and "the several legacies herein mentioned." Sir John Stuart V.-C. said in that case: "I think it is impossible to say that he meant that residue which, using the word in its literal sense here, would consist of what would remain after payment of the legacies given by the will. Therefore it is reasonably clear, upon the construction of this will, that the words 'herein mentioned,' where they were first used, mean 'in the will and codicil' and that every legacy in the codicils as much as in the will, is described by the words 'herein mentioned.'"

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(1) (1750) 2 Ves. Sen. 242.

(2) 3 Giff. 308, 317.

That being so, I approach the next clause: "I declare that all bequests and legacies given to married women shall be for their respective separate use." Does not that apply to any legacy which may be given by the codicil as well as by the will? In my opinion it does, and that is not really seriously questioned by Mr. Maugham. Then we come to this clause: "I declare that no legacy given by this my will shall lapse by reason of the death of the legatee before me but that the same shall take effect as if the death of such legatee had happened immediately after my death and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." Is not that a general clause too, in exactly the same circumstances as the clauses preceding it—a direction that all legacies shall be paid out of real estate, and a direction that all legacies shall be for the separate use of the married legatees? Then there is some stress laid on the subsequent words of the will: "I hereby appoint the said"—naming them—"executors of this my will." It is quite plain that that is an appointment of executors, not merely of the will, but of any other testamentary instruments which may be admitted to probate after her death, otherwise the word "will" would have to be read in the general sense as a testament, and not merely a particular instrument. Then there are several codicils which I need not refer to in particular until I come to the sixth codicil. The codicil is dated November 20, 1908: "I hereby appoint Beatrice May Eldridge spinster the daughter of my friend Melancthon Zwingle Eldridge as executors of my said will in place of Thomas Pearson and William Walsh Pearson both deceased and I hereby revoke the legacy of 50*l.* given to the said William Walsh Pearson." It is said—and there is, I think, force in it—that, William Walsh Pearson taking under a codicil and not under the will, there was no possible justification for revoking the legacy to him, unless in the view of the testatrix she supposed that but for such revocation the legacy would be given under that clause which I have read to the legal personal representative of William Walsh Pearson. Then comes the seventh codicil, which is the last, under which a legacy free of duty is given to Mr. W. H. Hayman of a leasehold house and its contents, and then follow these words: "and in all other respects I hereby confirm my said will and six previous codicils." W. H. Hayman predeceased the testatrix,

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and the question is whether under the clause in the will which I have read his legal personal representative does or does not take that which was intended for him if he had survived the testatrix. I will read again the words: "I declare that no legacy given by this my will shall lapse by reason of the death of the legatee before me but that the same shall take effect as if the death of such legatee had happened immediately after my death and such legacy shall accordingly pass to the legal personal representative of such deceased legatee."

In my opinion there is sufficient in the context of this will and in the testamentary documents, all taken together, to justify me in saying that the legal personal representative should take the legacy which by the last codicil is expressed to be given to W. H. Hayman, and that is the view which Sargant J. took in his judgment.

I do not propose to go through the authorities which have been cited to us at such length. I will only say, speaking for myself, that I do not think that either *Henwood* v. *Overend* (1) or *Bonner* v. *Bonner* (2) can be considered as at all conclusive among the other unsatisfactory authorities which deal with the point. On the whole I think that the decision of Sargant J. is right, and that the appeal should be dismissed.

PICKFORD L.J. I agree, and I do not think it necessary to add anything.

WARRINGTON L.J. I agree.

Appeal dismissed.

Solicitors for appellants: *Hutchison & Cuff.*

Solicitors for respondents: *Kingsford, Dorman & Co., for J. J. Williamson, Deal.*

Solicitors for trustees: *Walter Maskell & Co.*

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(1) 1 Mer. 23.

(2) 13 Ves. 379.

H. C. R.

In re GROSVENOR.

GROSVENOR *v.* GROSVENOR.

[1916 G. 698.]

ASTBURY J.

1916

July 20.

Will—Specific Legacies—Shares—Freehold Mortgage—Assent of Executors—Costs of Transfer—Incidence.

Where executors assent to specific legacies of shares or mortgages, the costs of transfer, including the executors' own costs in connection therewith, must be borne by the specific legatees.

In re De Sommery [1912] 2 Ch. 622, 628, and *In re Scott* [1915] 1 Ch. 592, 606, applied.

ORIGINATING SUMMONS.

By his will, dated April 15, 1909, a testator, after directing payment of his debts and funeral and testamentary expenses, gave and bequeathed the whole of his real and personal property to his wife (who predeceased him) for life, and appointed her and the plaintiffs his executors and trustees.

The testator made various specific bequests of railway shares, company shares, and a freehold mortgage to various specific legatees, and gave a large number of pecuniary legacies and a life annuity. He authorized the plaintiffs to postpone the sale of the whole or any part of his estate for such periods as they should think proper and directed them to stand possessed of the moneys to arise from the sale or conversion of his estate in trust for certain residuary legatees.

The testator died on May 6, 1913.

The debts and the greater part of the death duties were paid, but the estate was not yet fully wound up, and owing to the depreciation of securities it was doubtful whether the pecuniary legacies could be paid in full. The plaintiffs had, however, assented to the specific legacies, and were prepared to transfer them to the specific legatees subject to the question whether the costs of transfer were to be borne by the specific legatees or the residue.

On May 8, 1916, the plaintiffs issued this summons to determine (inter alia) how the costs of transferring the specific legacies ought to be borne.

H. S. Preston, for the plaintiffs. There is no direct authority on the question how the costs of transferring specific legacies of shares or mortgages are to be borne, but somewhat similar points were discussed in *In re De Sommery* (1) and *In re Scott.* (2)

Chetham-Strode, for specific legatees. Those were both cases of foreign assets involving abnormal expenses of realization. In *In re De Sommery* (1) it was held that the French succession duty and the costs incurred in connection therewith and the costs of realizing some of the shares for payment of a legacy charged thereon fell on the specifically bequeathed French shares. In *In re Scott* (2) it was similarly held that the French mutation duty on the Paris tapestry fell on the specific legatee, and that it was not the executors' duty to go to Paris and pay the mutation duty in order to get the tapestry and deliver it to the legatee.

There are no abnormal expenses of this sort in the present case. If the specific legacies had been chattels it would have been the executors' duty to deliver them to the specific legatees, and their reasonable expenses in so doing would have fallen on residue: see the judgment of Phillimore L.J. in *In re Scott.* (3) In the present case the legal title in the specific legacies which are choses in action is vested in the plaintiffs, and it is their duty to transfer that legal title to the specific legatees. The costs of so doing are ordinary costs of administration and fall on residue.

Stamp, for a pecuniary legatee. As it is doubtful whether there will be any residue, I am directly interested in this question. The principle is perfectly simple. The moment the executors assented to the specific legacies they became trustees for the specific legatees. In the case of furniture or chattels it would strictly be their duty to give them a delivery order, and let them make their own arrangements for carriage, though no doubt where the expense is small this rule is often departed from. In the case of transfers of shares or mortgages they have merely to execute the transfers and deliver the securities. The expenses of preparation and execution of the transfers by the trustee-executors are ordinary administration expenses and fall on the residue. But the specific legatees must bear their own costs of perusing, accepting, stamping, and registering the transfers. The point is virtually covered by *In re De Sommery* (1) and *In re Scott.* (2)

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(1) [1912] 2 Ch. 622, 628.

(2) [1915] 1 Ch. 592, 606.

(3) [1915] 1 Ch. 610.

ASTBURY J.

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GROSVENOR, *In re.* GROSVENOR *v.* GROSVENOR.

H. T. Methold, for the annuitant.

Christopher Farwell, for a residuary legatee.

ASTBURY J. (after stating the facts). The question is whether the costs of transferring the specific legacies, including the stamp duty, fall on those legacies or on residue. I should have imagined that the practice had long been settled, but I am told there is no direct authority on the point.

In *In re De Sommery* (1) a testatrix made a specific bequest of twenty-one shares in a French company to her executors and trustees upon trust to retain or sell the same and to hold the same or the proceeds thereof upon certain trusts for specific legatees. In completing their title to the French shares in order to be in a position to realize and distribute them the executors and trustees had to pay French succession duty and incurred certain costs in connection therewith, and also costs of realizing some of the shares for payment of a legacy charged thereon. The question was whether the succession duty and the costs were to be paid out of the proceeds of the shares or how otherwise. Parker J. said: "The trustees were also executors, and must therefore, as such, have assented to the gift of the twenty-one shares to themselves. After such assent they were entitled to the shares as trustees and not as executors. In completing their title according to French law they have paid certain sums claimed by the French Government by way of succession duty, and in so doing, and also in connection with the realization of the shares in question, have incurred certain costs." After holding that the shares must bear the French succession duty he proceeded: "With regard to the costs, they were, in my opinion, all costs incurred in carrying into effect the trusts of the twenty-one shares, and not costs of the general administration. They should, therefore, be borne by the property in respect of which they were incurred, and not by the estate generally."

In *In re Scott* (3) the question was how the French mutation duty on specifically bequeathed French tapestry was to be borne. Lord

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(1) [1912] 2 Ch. 622, 628.

(2) [1915] 1 Ch. 592, 606.

(3) [1915] 1 Ch. 592, 606, 607.

Cozens-Hardy M.R. said: "It is said that it is the duty of an executor, where there is a specific bequest of property which is in a foreign country, to go to that foreign country and to procure the specific article, to pay what is necessary in order to get it, and to bring it back to this country. Each one of us has asked, I think, for a statement by any text-writer to support that proposition. I can find none, and it is conceded there is none. Is there anything in principle which can justify it? I think not, for many reasons, but the one that strikes me most is this. When there is a specific legacy the first duty of the executor is to consider whether he assents to it or not. If he assents to it the property passes out of him and is in the specific legatee, and from that moment the executor cannot possibly interfere with the possession of the chattels, cannot claim them from anybody else, and the legatee who has the legal title is the person to recover them, and to do what is necessary."

In the present case the costs of transfer and stamps are not costs incurred by the executors and trustees in getting in the estate for distribution, but they are incurred and payable after the specific legacies have been assented to. On the principle of *In re De Sommery* (1) and *In re Scott* (2) these are costs and expenses which the separate specific legatees must pay in order to complete their title to their specific property, which after assent the plaintiffs are holding as trustees for them, and not as executors.

H. S. Preston. Does your Lordship mean to include the executors' own costs in relation to the transfers?

ASTBURY J. Yes. The specific legatees must bear the whole costs of transfer.

Solicitors: *A. S. Potter & Co.; Francis Miller & Steele; Stringer & Stringer.*

(1) [1912] 2 Ch. 622, 628. (2) [1915] 1 Ch. 592, 606.

G. R. A.

In re KENNEDY.

CORBOULD *v.* KENNEDY.

[1916 K. 268.]

ASTBURY J.
1916
June 28, 29.

Will—Construction—Legacies and Annuities—Specific Devise—Trust for Sale and Conversion—Direction to pay "Death Duties," Debts, Legacies, and Annuities out of Proceeds—Settlement of Residue of Proceeds—Annual Sums given thereout—Life Interests therein—Death Duties thereon—Incidence.

By his will, dated December 9, 1912, a testator who died on June 12, 1914, after giving certain specific and pecuniary legacies and life annuities and making a specific devise, declared (clause 6) that "all the legacies annuities and bequests" bequeathed by his will should be given and paid free of all "death duties."

By clause 7 he gave his residuary estate on trust for sale and conversion and directed that the trustees should pay his funeral and testamentary expenses, "death duties," debts, legacies, and annuities out of the proceeds, and invest the residue thereof as therein mentioned and hold the same (clause 8) upon trust to pay the "annual sum" of 500*l.* each to A. and B. during the life tenancies of C. and D., and subject thereto upon trust for C. and D. successively for life, with remainder to A. and B. absolutely in equal shares:—

Held, that neither the annual sums given out of the clear residue nor the life interests in that clear residue were freed from death duties by clauses 6 or 7.

In re Pimm [1904] 2 Ch. 345, *In re Cayley* [1904] 2 Ch. 781, and *In re Hatch* [1916] W. N. 240 distinguished.

ORIGINATING SUMMONS.

By his will, dated December 9, 1912, a testator provided as follows:—

By clause 1 he appointed the two plaintiffs executors and trustees of his will and bequeathed 500*l.* to each of them accepting the office.

By clause 2 he bequeathed certain "specific legacies."

By clause 3 he bequeathed certain "pecuniary legacies."

By clause 4 he bequeathed certain life "annuities" and directed his trustees to appropriate investments producing a sufficient income to answer them at the time of appropriation, with power to resort to the capital whenever the income was insufficient. He authorized his trustees as each annuity ceased to treat a corresponding part of the appropriated fund as residue, retaining only such part as would from time to time in their opinion be sufficient to produce by its income an annual sum equal to the subsisting annuities.

By clause 5 he devised all his real estate in Lancashire to his cousin Nigel absolutely.

By clause 6 he declared "that all the legacies annuities and bequests bequeathed by this my will or by any codicil hereto shall be given and paid free of all death duties."

By clause 7 he devised and bequeathed "all the real and personal estate not hereby or by any codicil hereto otherwise disposed of" unto his trustees upon trust for sale and conversion with the usual power of postponement, and directed that they should "out of the money to arise from such sale and conversion and out of my ready money pay my funeral and testamentary expenses death duties and debts and the legacies and annuities hereby or by any codicil hereto bequeathed," and should invest the residue of the said money in the investments thereby authorized.

By clause 8 the trustees were directed to stand possessed of the said investments therein called "my residuary estate" and of the annual income thereof upon trust to pay during the joint lives of the testator's sister Marion and his cousin Myles and during the life of the survivor of them the "annual sum" of 500*l.* each to the testator's cousins Nigel and Hugh, and subject to such respective "annual sums" to pay the income to Marion for life without power of anticipation (or in certain events to apply the same under a discretionary trust giving her a protected life interest), and after her death to pay the income to Myles for life, and after his death the residuary estate and the income thereof were to be held in trust for Nigel and Hugh absolutely in equal shares.

By a codicil dated May 22, 1913, the testator gave a further pecuniary legacy free of death duties, and also gave an annuity free of duty in lieu of a pecuniary legacy given by clause 3, but did not otherwise alter his will.

The testator died on June 12, 1914.

On May 3, 1916, the executors and trustees issued this summons to determine—

1. Whether, upon the true construction of the will, (*a*) the estate duty and (*b*) the succession duty payable in respect of the

real estate in Lancashire devised to Nigel by clause 5 ought to be paid out of the proceeds of sale and conversion under clause 7 or ought to be borne by Nigel.

2. Whether all succession duty and legacy duty payable by reason of the testator's death in respect of the real and personal property passing under his will and codicil ought to be paid out of the capital of the proceeds of sale and conversion under clause 7, or whether the legacy and succession duty payable in respect of (*a*) the two annual sums of 500*l.* given to Nigel and Hugh by clause 8 and (*b*) the life interests given to Marion and Myles by clause 8 ought to be borne by them respectively.

3. Whether the two annual sums of 500*l.* given to Nigel and Hugh were to be paid free of all legacy duty, succession duty, and other duties (if any).

4. How the death duties payable by reason of the testator's death ought to be borne and paid.

It was admitted at the hearing that the specific devise of the Lancashire estate was duty free, and the arguments were confined to the duties on the annual sums given to Nigel and Hugh and the life interests of Marion and Myles.

C. P. Sanger, for the plaintiffs. Estate and settlement estate duty have been paid out of corpus, and it is not disputed that the legacies, annuities, and devise in the first five clauses are free of legacy, succession, and estate duty. The other duties now payable are the legacy or succession duties on the annual sums given to Nigel and Hugh and on Marion's life interest in the residue. The first question is whether these annual sums and life interest are free of duty.

On Marion's death there will be further legacy or succession duty at a different rate in respect of Myles' life interest if it comes into possession. Is this to be paid out of residue? There will also be further estate duty, as the relief given by the payment of settlement estate duty has been abolished by the Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 14. This would be payable out of corpus, with the effect of reducing the income during Myles' life. Is this reduction to be made up out of corpus? These are future questions, but it would be convenient to decide them now.

The duties payable on the ultimate succession of Nigel and Hugh on the termination of the life tenancies will of course be borne by their residue, and it is possible that the legacy or succession duties on the slice of residue representing the annual sums payable to Nigel and Hugh till they come into possession ought to be paid at once, in which case there will be no further duty payable on those sums.

Whitmore Richards (*J. I. Stirling* with him), for Nigel and Hugh. Death duties include estate, legacy, and succession duty: Finance Act, 1894 (57 & 58 Vict. c. 30), s. 13, sub-s. 3. The annual sums given to Nigel and Hugh during the life tenancies are annuities and are free of duty under clauses 6 and 7, and though no doubt the duty will ultimately be borne by their estates in remainder, they would like their annuities paid free of duty now. But the life interests of Marion and Myles are not annuities. They are life interests in residue and are not given free of duty: Hanson's Death Duties, 6th ed. p. 516; *Lord Londesborough* v. *Somerville* (1); *In re Dalrymple.* (2)

Fairfax Luxmoore, for the life tenants Marion and Myles. The question as to the future duties payable on Myles' reversionary life interest may never arise and ought not to be decided now. But Marion's life interest is in possession, and the question how the legacy or succession duty payable thereon is to be borne is ripe for decision. That duty arose at the testator's death directly under the dispositions of his will. It therefore falls within the direction to pay "my . . . . death duties" out of the proceeds of sale and conversion under clause 7. The same argument applies to the annual sums now payable to Nigel and Hugh during the life tenancies: *In re Pimm* (3); *In re Cayley* (4); *In re Briggs* (5); *In re Hatch.* (6)

[ASTBURY J. Those cases related to the duties on specifically settled property. In the present case the death duties are to be paid and a clear residue ascertained for investment. It is only out of that clear residue that the annual sums are to be paid to Nigel and Hugh, the rest of the income going to Marion for life,

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(1) (1854) 19 Beav. 295.
(2) (1901) 49 W. R. 627.
(3) [1904] 2 Ch. 345.
(4) [1904] 2 Ch. 781.
(5) [1914] 2 Ch. 413.
(6) [1916] W. N. 240.

How can that clear residue be ascertained if the direction to pay death duties applies to annual sums and life interests carved out of it?]

The clear residue is not really ascertained till all the death duties payable at the testator's death are paid. The Inland Revenue would have no substantial difficulty in assessing the duties payable on the annual sums and Marion's life interest, and then the true net residue would be ascertained.

ASTBURY J. (after stating the facts). The scheme of the will is shortly as follows: The testator gives certain legacies described as specific and pecuniary, and certain annuities described as such. He makes a specific devise of certain real estate, and then declares that all the legacies, annuities, and bequests bequeathed by his will or any codicil shall be given and paid free of death duties. The legacies and annuities given in the first four clauses are obviously within that direction and are payable free of death duties. The question, however, arises whether the two annual sums of 500*l.* given out of his residue to his cousins Nigel and Hugh are annuities within the meaning of clause 6 and payable free of duty, or, alternatively, whether they are payable free of duty by reason of the direction in clause 7 to pay the testator's death duties out of the proceeds of sale and conversion of his residuary estate. The second question which arises is whether the life interests of Marion and Myles in the residuary estate subject to the two annual sums of 500*l.* are, either under clause 6 or 7, or both of them, payable free of duty.

On what I believe to be the true construction of this will, the expression "legacies annuities and bequests" in clause 6 does not apply to the interests into which the testator has split up his residuary estate. I think this is made clear from the terms of clause 7, where the testator provides that out of the proceeds of sale and conversion of his residuary estate and out of his ready money (inter alia) the legacies and annuities given by his will and codicil are to be paid; and it is only the clear residue after providing for what he describes as legacies and annuities given by his will or any codicil thereto that is to be the fund out of which the two annual sums of 500*l.* each are to be paid. I am therefore of opinion that the two annual sums of 500*l.* are not payable free of death duty by reason of the provisions of clause 6. I am also of opinion that the life interests in the residue given in favour of Marion and Myles are not bequests within the meaning of clause 6, and not thereby free from duty.

It remains to decide the main point in this case, namely, whether the direction in clause 7 that the testator's death duties are to be paid out of his residue before the net residue to be invested is ascertained is a sufficient direction to free the two annual sums of 500*l.* given to Nigel and Hugh during the life tenancies of Marion and Myles, and also the life interests of Marion and Myles, from the payment of legacy or succession duty, and from the estate duty which will be payable on the succession of Myles to his life interest on Marion's death. In my judgment these duties are not payable by virtue of the direction in clause 7. I think on the true construction of this clause that the testator intended that, after providing for the legacies, annuities, and the specific devise in the first five clauses and the duties thereon, the rest of his estate should be realized, and out of the proceeds of realization there should be obtained a clear residue for investment, which residue was to be the balance remaining after payment of what he describes as his funeral and testamentary expenses, death duties, debts, legacies, and annuities. I think the expression "death duties" in that clause, having regard to the general context of the will, means the legacy or succession duties payable on those legacies, annuities, and specific devise, and the general estate and settlement estate duty payable on the whole of the testator's estate at his death. I do not think it was intended to cover the legacy, succession, or other additional estate duties payable on any part of the clear residue, which was to be ascertained after the payment of the duties in question.

I have been referred to a number of authorities, but none of them seem to me to govern this case at all. In *In re Pimm*(1) the testator, after making certain specific and pecuniary bequests, devised to his trustees certain freeholds which were settled upon his daughter for life with remainder to her children, with a gift over in default. He then devised and bequeathed the residue of his estate upon trust for sale and conversion and directed that after payment of

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(1) [1904] 2 Ch. 345, 347.

"my debts, funeral and testamentary expenses and duties" the clear residue should be held in trust to be divided between certain persons. Farwell J. held that the expression "duties" covered the settlement estate duty in respect of the specifically settled realty. He said: "The question is, What duties are included in the direction to pay 'my debts, funeral and testamentary expenses and duties' out of the proceeds of the residuary estate? The expression 'my duties' is certainly a wide phrase, and I can see no ground for restricting its generality." The only question the learned judge was asked to decide was whether the settlement estate duty in respect of the specifically settled realty, the settlement of which was prior to the disposition of the residue, was payable out of the residue and before the residue could be ascertained. Farwell J. continued: "I think it is a compendious way of expressing what he had in his mind, and that he meant to say, 'all duties to which my estate is liable by reason of any of the dispositions I have made in my will.'" I think the learned judge was referring to the dispositions with which he was concerned; that he did not intend to suggest that if the clear residue—which was expressed to be the sum remaining after payment (inter alia) of the duties directed to be paid—had been settled the further duties occasioned by reason of that settlement would have been affected in consequence of any such direction. That case was followed in exactly similar circumstances in *In re Cayley.* (1)

In *In re Hatch* (2) the testator, after directing that certain specific real and personal securities should be held upon certain settlement trusts appearing in his will, directed in clause 20 that "all legacy, annuity, succession, or other duties payable in respect of all and every the benefits given by this my will (and save and except the legacy, succession, and other duties payable by my residuary legatees in respect of their shares and interests of and in my residuary real and personal estate, and which duties are to be borne and paid by such residuary legatees respectively) shall be borne and paid by my residuary trust estate." The difficulty that arises in this case was expressly provided for and prevented by the directions in that particular will, and the decision therefore seems to me to have no application to what I have to decide.

(1) [1904] 2 Ch. 781.

(2) [1916] W. N. 240.

ASTBURY J.
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It is clear in an ordinary case that duties payable in respect of residue can only be paid out of residue. A gift of residue free of duty is a contradiction in terms, and in this particular case, having regard to the language in which the will is couched, I am of opinion that the duties payable in respect of these two annual sums of 500*l.* and the life interests of Marion and Myles are not payable before the ascertainment of residue in consequence of the provision in clause 7 and these annual sums and life interests are not free of duty.

Solicitors: *Corbould, Rigby & Co.*

G. R. A.

SARGANT J.
1916
July 7.

In re FORREST.
BUBB *v.* NEWCOMB.

[1916 F. 107.]

Will—Construction—Legacy to "Servants"—Inapplicability to Farm Labourers.

Testator gave "to each of my servants who shall have been in my service for three years prior to my decease, and shall be still in my service, one year's wages." At the time of his death testator had land of about 700 acres in Gloucestershire. There was a house on the land in which he employed several domestic servants. He farmed practically the whole of the property himself, and in his farming he employed six labourers at ordinary labourers' wages, who, if servants, complied with the other conditions of the legacy:—

Held, that the labourers were not "servants" within, and did not take under, the legacy.

Semble, that the word "servants," in a legacy to servants simpliciter, ordinarily means persons of the class of domestic servants, though not necessarily employed only in the testator's house, who minister in some way to his personal comfort or wants.

Booth v. *Dean* (1833) 1 My. & K. 560 and *Thrupp* v. *Collett* (No. 2) (1858) 26 Beav. 147 followed.

THE testator, George F. Forrest, by his will dated April 7, 1913, appointed W. N. Bubb, the plaintiff, his sole executor, and the will then proceeded as follows: "I give and bequeath to each of my servants who shall have been in my service for three years prior to my decease, and shall be still in my service, one year's wages, free of legacy duty." The testator then gave his residuary property to his brother, Charles E. Forrest. The testator died on December 28, 1914, and his will was proved in February, 1915. The brother, then a major in His Majesty's Army, was killed in action on November 22, 1915, having by his will (made in 1912) appointed his wife, Ruth M. Forrest, and Reginald J. Winterbotham his executrix and executor. At the time of his death the testator had an estate of about 700 acres at Pegglesworth in the county of Gloucester, and he himself, with the aid of an agent and a bailiff, worked a farm which formed the greater part of the estate. In his residence on the estate he had three or four domestic servants, as to whom no question was raised, and he also employed seven persons, one of whom was an under-keeper and the other six of whom were employed as labourers on the estate. Each of these six was engaged for the usual farm labourer's service of twelve months, and had a wage of from 13*s.* to 16*s.* a week, paid weekly. In addition, each was allowed the use of a cottage (of the value of 1*s.* 6*d.* per week) rent free. Each of these outdoor employees had been in the testator's employment for more than three years at the time of his death.

The testator's executor raised by originating summons the question whether the seven outdoor employees took a year's wages under the legacy to servants. Major Forrest's representatives admitted that the under-keeper was entitled under the legacy, and declined to raise any objection to the claims of the six labourers on the ground that their wages were paid weekly.

Cecil W. Turner, for the plaintiff, stated the facts and the question raised by the summons.

Herbert J. H. Mackay, for the seven employees. The six farm labourers and the under-keeper are all "servants" within the meaning of that term as used in the bequest.

[The representatives of Major Forrest admitted that the under-keeper was a servant within the meaning of the bequest.]

The farm labourers are also servants. Their case is similar to that of the farm bailiff in *Bulling* v. *Ellice*. (1) The term "servants" is not confined to servants living in the testator's house. It has

(1) (1845) 9 Jur. 936.

been held to apply to a gardener and under-gardener not living in the house and continuously employed, but not to a boy employed part of each year to carry letters: *Thrupp* v. *Collett* (No. 2). (1) A person acting as the land agent and house steward of the testator, though not living in his house, has been held to take under a gift to servants: *Armstrong* v. *Clavering.* (2) The decision of Joyce J. and the Court of Appeal in *In re Ravensworth* (3), following *Blackwell* v. *Pennant* (4), that certain woodmen, keepers, masons, and hinds were not within a legacy to servants, did not turn on the fact that they were in the position of labourers, but on the fact that they were engaged at wages calculated by the week or month, and were not engaged by the year. In the case of a legacy to "indoor and outdoor servants" it was held that persons in the position of a gardener, under-gardeners, estate carpenters, and estate labourers took whether they were hired at yearly or weekly wages: *In re Earl of Sheffield.* (5) In the present case the labourers were hired by the year, although they were paid weekly.

[Major Forrest's representatives did not raise any point about the way in which the wages were payable or paid.]

The common use of the term "domestic servants" shows that there are other persons who are properly described as servants besides those who live in their master's house. [He also referred to *Booth* v. *Dean* (6), *Rex* v. *Inhabitants of Worfield* (7), *Nowlan* v. *Ablett* (8), and Theobald on Wills, 7th ed. pp. 273, 274.

[SARGANT J. referred to Jarman on Wills, 6th ed. p. 1120.]

Tyldesley Jones, for Major Forrest's representatives. Farm servants are not within the gift. The difficulty has arisen from *Booth* v. *Dean* (6), where Sir John Leach M.R. held that a person who had worked in the testator's garden, under his gardener, for several years at weekly wages, and a boy who had served the testator for some time as a cowboy at weekly wages, and neither of whom resided with or formed part of the testator's family, did not take under a gift to each of testator's servants of a year's wages. The Master of the Rolls held "that these persons were not servants in

(1) 26 Beav. 147.
(2) (1859) 27 Beav. 226.
(3) [1905] 2 Ch. 1.
(4) (1852) 9 Hare, 551.
(5) [1911] 2 Ch. 267.
(6) 1 My. & K. 560.
(7) (1794) 5 T. R. 506.
(8) (1835) 2 C. M. & R. 54.

the sense in which the testator had used the expression." According to Cozens-Hardy M.R. in *In re Earl of Sheffield* (1), Turner V.-C., in *Blackwell* v. *Pennant* (2), erroneously thought he was following Sir John Leach's decision in *Booth* v. *Dean.* (3) In *Thrupp* v. *Collett* (No. 2) (4) the decision turned on the nature of the employment. Neither *In re Ravensworth* (5) nor *In re Earl of Sheffield* (1) is of any assistance here; and there is no reported decision that a farm labourer is a servant who takes under a gift like this.

SARGANT J. The question in this case is who are entitled under a bequest by the testator "to each of my servants who shall have been in my service for three years prior to my decease, and shall be still in my service, one year's wages, free of legacy duty."

The testator had a small estate in Gloucestershire of some 600 or 700 acres, and he had an ordinary establishment there comprising three or four indoor servants, a stud groom, and an under-keeper. He himself farmed almost the whole of his property, if not the whole of it, and in his farming he employed six labourers at ordinary labourers' wages. It is conceded that they were, as is customary in that part of the country, hired yearly and at a wage determined by the year, although in fact they were paid by the week. Therefore, no such point arises here as arose in cases like *In re Ravensworth* (5) and *In re Earl of Sheffield.* (1) These labourers are not excluded merely because they were not paid by the year. As regards the under-keeper, Mr. Tyldesley Jones has not contested that he was a "servant" within the meaning of the words I have read, but the question arises whether the six labourers were servants in the service of the testator within the meaning of those words.

I confess that when I first read the will I had a clear view that, although these six persons were servants in some sense, they were not servants in the service of the testator within the true meaning of the words used in the will, and that the testator was referring to persons who ministered in some way to his personal comfort, or his wants—persons of the class of domestic servants, though not necessarily only those employed in the house. After having heard

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(1) [1911] 2 Ch. 267, 271.
(2) 9 Hare, 551.
(3) 1 My. & K. 560.
(4) 26 Beav. 147.
(5) [1905] 2 Ch. 1.

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all the cases read, I am a good deal more puzzled than I was at first. But, in the result, I adhere to my first impression, and I observe that it is the view which was taken by Sir John Leach M.R. in *Booth* v. *Dean.* (1) I think also that it is the view which was very clearly indicated by Sir John Romilly M.R. in *Thrupp* v. *Collett* (No. 2). (2) It is true that in such cases as *In re Ravensworth* (3) and *In re Earl of Sheffield* (4)—certainly in the latter case—there were some claimants who were in the same position, or very nearly the same position, as the six claimants in this case, and that they were not excluded on the ground that they were in that position. But the point was never argued; they were excluded for other reasons, and it may well be that the counsel who argued against their inclusion chose to base his argument merely upon those reasons.

I cannot find in the cases anything which amounts to a decision, or even to an indication of opinion, that persons in the position of farm labourers would come within the prima facie meaning of the word "servants" in such a will as this. I think that in this case the narrower meaning of the word "servants" is that in which the term has been used by the testator, and that these six persons do not take under the bequest.

Solicitors for plaintiff: *Field, Roscoe & Co., for Bubb & Co., Cheltenham.*

Solicitors for employees: *Jacksons, Elwell & Curran, for Jessop & Son, Cheltenham.*

Solicitors for residuary legatee's representatives: *Waterhouse & Co., for Winterbotham, Gurney & Co., Cheltenham.*

(1) 1 My. & K. 560.
(2) 26 Beav. 147.
(3) [1905] 2 Ch. 1.
(4) [1911] 2 Ch. 267.

F. E.

xplained. Re Duke of Norfolk's
ill Trusts. [1949] 2 All E.R. 701.

In re PALMER.

PALMER *v.* PALMER.

[1915 P. 2024.]

C.A.
1916
May 24, 25;
June 3.

Revenue—Estate Duty—Incidence—Settled Legacy—"Free of all duties"—Annual Sum out of Income of Residue—New Duty imposed after Death of Testator—Finance Act, 1914 (4 *& 5 Geo.* 5, *c.* 10), *s.* 14—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7 (*b*); *s.* 9, *sub-s.* 1.

Testator, by his will made in 1910, bequeathed to trustees the sum of 25,000*l.* upon trust during the life of his wife to pay the income to the person who would for the time being be entitled as tenant for life or tenant in tail to the rents of his settled hereditaments if his wife were then dead, and directed that after the death of his wife the said sum should fall into residue, and that all legacies thereinbefore given or which might be given by any codicil should be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees; and the testator thereby devised his settled hereditaments to his trustees upon trusts in favour of his wife during her life, and after her death to the use of his nephew A. for life, with remainder (in the events which happened) to his nephew B. for life, with remainder to the use of B.'s children in strict settlement; and the testator thereby gave his residuary real and personal estate to his trustees upon trust for sale and conversion, and out of the moneys so to arise to pay his funeral and testamentary expenses and legacies, and to make provision for the payment of all duties on any bequests thereinbefore made free from duties or deductions for duties, and to invest the residue upon trust out of the income thereof to pay an annual sum of 3000*l.* to the person who would be so entitled as tenant for life or in tail as aforesaid, and to hold the surplus income upon the trusts therein mentioned.

The testator died in 1913. A. died a bachelor in 1915. Upon the question how as between the beneficiaries under the will the estate duty payable on the death of A. imposed since the testator's death by virtue of the Finance Act, 1914, s. 14, ought to be borne:—

Held, (1.) reversing the decision of Younger J. [1916] 1 Ch. 395, that the duty on the settled legacy must be paid out of the investments representing the 25,000*l.*, and not out of the residue (1); and (2.), varying the order (as drawn up) of Younger J., that, inasmuch as the annuity of 3000*l.* was chargeable upon the whole

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(1) *Quaere* whether this is not in effect what Younger J. really decided on the second point. See [1916] 1 Ch. 404; and see also *In re Booth* [1916] 1 Ch. 349, 354, where he dealt with the same point.—Reporter.

C. A.
1916
Palmer, In re.
Palmer v. Palmer.

estate, the residue, the whole of which benefited by the cesser of the annuity, must bear the duty, the annuitant being liable, however, to pay interest on a rateable proportion of the duty corresponding to the proportion which the notional sum required to produce the annuity bore to the whole residue. (1)

In re Parker-Jervis [1898] 2 Ch. 643 applied.

In re Snape [1915] 2 Ch. 179 does not establish any general principle.

Appeal and cross-appeal from the decision of Younger J. (2)

By his will, dated October 14, 1910, George William Palmer appointed the plaintiffs and the defendants, Eustace Exall Palmer and Alfred Palmer, to be his executors and trustees, and after bequeathing certain specific and pecuniary legacies (by clause 11) bequeathed to his trustees the sum of 25,000*l.* upon trust for investment, and during the life of his wife, the plaintiff Eleanor Barrett Palmer, to pay the income of the invested fund to the person who, under the limitations of the settled hereditaments thereinafter contained, would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of his Berkshire estates (therein described as the "settled hereditaments") if his said wife were then dead; and after the death of his said wife he directed that such fund should fall into and form part of the settled residue (thereinafter defined) and so as to form one fund therewith for all purposes, but not so as to increase or multiply charges or powers of charging; and (by clause 12) after bequeathing an annuity of 12,000*l.* to his said wife during her life, with power for his trustees to appropriate part of his estate to provide for the payment thereof, the testator (by clause 13) declared that "all legacies annuities and bequests whatsoever hereinbefore given or made, and all legacies annuities and bequests which may be given or made by any codicil hereto shall be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees or annuitants entitled thereto respectively under the preceding clauses of my said will"; and after making certain specific devises the testator (by clause 16) devised his settled hereditaments to his trustees during the life of his said wife upon trust to permit her during her life to have the use and enjoyment or

(1) See note on p. 391, ante.

(2) [1916] 1 Ch. 395.

to receive the rents and profits of all or any part thereof, and subject as aforesaid to pay and apply the net rents and profits in the manner in which the income arising from the settled residue was thereinafter directed to be paid and applied and so as to form one fund with such last-mentioned income; and after the death of his said wife the testator (by clause 17) devised his settled hereditaments to the use of his nephew the late Ronald William Palmer (then and therein described as Ronald William Poulton) for life, with remainder in favour of his issue in tail, with remainder to the use of his nephew the defendant Eustace Exall Palmer for life, with remainders to the use of his children or remoter issue as he should appoint, and in default of appointment to the use of his sons and daughters in strict settlement, with remainder to the use of his first and every other daughter successively.

And the testator (by clause 22) devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion as therein mentioned, and upon trust out of the moneys so to arise or forming part of his residue to "pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and make provision for the said annuity of 12,000*l.*, and also make provision for the payment of all duties on any devises and bequests hereinbefore made free from duties or deductions for duties," and to hold the residue of the said moneys upon trust for investment, and as to the invested fund (thereinafter called the settled residue) upon trust during the period of accumulation (meaning by such expression the period commencing from his death and terminating at the expiration of twenty-one years from his death or at the previous death of his said wife, or at such earlier date as he should by deed appoint) out of the income of the settled residue to pay "an annual sum of 3000*l.*" to the person who under the limitations of the settled hereditaments thereinbefore contained would for the time being be entitled as tenant for life or in tail to the possession or receipt of the rents and profits of the settled hereditaments if his said wife were then dead, and to accumulate the surplus income of the settled residue, and from and after the period of accumulation, if his wife should then be living, upon trust to pay the whole income of the settled residue and of the accumulations thereof during the residue of her life to such person

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as aforesaid (as in the case of the said annual sum of 3000*l.*), and after her death upon trust to hold the settled residue and the accumulations thereof upon trust in the first place to raise thereout three several sums of 30,000*l.* each clear of all deductions whatsoever for the benefit of his sisters as therein mentioned, and subject as last aforesaid upon trust to pay and apply the same as capital as thereinafter mentioned, namely, in the purchase of freehold hereditaments to be settled in the same way as the settled hereditaments.

The testator died on October 8, 1913.

Ronald William Palmer died a bachelor on May 4, 1915.

Eustace Exall Palmer had two sons and a daughter, all of whom were living at the testator's death. He had not yet exercised the power of appointment reserved to him by the will.

An originating summons was taken out raising the question how as between the beneficiaries under the will the estate duty imposed since the testator's death by virtue of s. 14 of the Finance Act, 1914, on the death of Ronald William Palmer in respect of the settled legacy of 25,000*l.* and the annual sum of 3000*l.* respectively ought to be borne.

It appeared that on December 3, 1913, the executors had appropriated or handed over to themselves as trustees in respect of the settled legacy certain securities of the value of 25,000*l.*, and estate duty thereon was paid by the executors on the death of Ronald William Palmer. In respect of the 3000*l.* annuity estate duty was claimed and paid by the executors on a notional sum of 75,000*l.* as being the amount required to produce the annuity.

Upon the hearing of the summons Younger J. held that the estate duty on the settled legacy must be borne by the residuary estate; and (according to the order as drawn up) that the estate duty on the annual sum of 3000*l.* or the notional sum required to produce the same ought to be raised out of the capital of the testator's residuary estate, and that the interest on such duty ought to be borne by the annual sum and by way of deduction therefrom.

Eustace Exall Palmer and his children appealed from the decision as to the duty on the 3000*l.* annuity, and there was a cross-appeal by Alfred Palmer, as representing the inheritance of the lands directed to be purchased out of the residuary estate, from the decision as to the duty on the settled legacy of 25,000*l.*

Romer, K.C., and *W. E. Tyldesley Jones*, for the appellant E. E. Palmer. The estate duty on the annual sum of 3000*l.* ought to be borne by the residue, and not by the annual sum or the notional sum of 75,000*l.* required to produce it. The case is within s. 1 of the Finance Act, 1894, which deals with property passing at the death, and not within s. 2, which deals with property that does not pass but is to be deemed to pass. The whole of the residue passed and is liable to the payment of the duty. The principles on which the Court acts in such cases are laid down by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners.* (1) See also *Lord Advocate* v. *Maclachlan.* (2) There is no justification for throwing the whole of the duty upon the notional sum of 75,000*l.* required to produce the annual sum of 3000*l.* The annuitant must no doubt bear a part of the burden, but a rateable proportion only, in accordance with *In re Parker-Jervis.* (3) There is no direction to set apart any capital sum, and there would be no loss of interest to the annuitant unless the capital sum was set apart. There is only one gift of the income of the residue; the annuity of 3000*l.* is a first charge.

As regards the estate duty on the settled legacy of 25,000*l.*, as to which there is a cross-appeal, the decision of Younger J. was right for the reasons given by him.

H. B. Vaisey, for the children of E. E. Palmer, supported the same arguments.

A. Grant, K.C., and *A. B. Nutter*, for the respondents on appeal (appellants on cross-appeal). The annuity of 3000*l.* given by the testator to different people in succession during the life of his widow is subject to duty under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and it has to be borne by the annual sum under s. 9, sub-s. 1, and s. 14, sub-s. 1. The Scotch case which was cited clearly shows that the duty payable from the estate is ascertained by valuing the annuity, but the duty must be borne by the notional sum which produces it. It does not follow that the annuitant has to pay the capital sum. It is sufficient if the annuitant pays the interest on the mortgage by which it was raised, as was decided in *In re Parker-Jervis.* (1)

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(1) [1899] A. C. 198, 210.

(2) (1899) 1 F. 917; 36 S. L. R. 727; [1900] W. N. 204.

(3) [1898] 2 Ch. 643.

As to the legacy of 25,000*l.*, *In re Snape* (2) is an authority that the legatees are not entitled to have the duty which was imposed after the testator's death paid out of residue, and it was rightly decided. That case shows the true principle. It was decided by Eve J. upon grounds of convenience which are of general application. It cannot be that all new duties imposed by the Legislature after the death of the testator in a case like this must be borne by the residue. Such a conclusion would be most inconvenient, inasmuch as it might result in postponing distribution for an indefinite period, and in making subsequent legislation operate retrospectively. It would render it necessary for trustees to provide for all possible future duties. *Jones* v. *Ogle* (3) and *Constable* v. *Constable* (4) were analogous decisions under the Apportionment Act, 1870. See also *In re March* (5), under the Married Women's Property Act, 1882, and *In re Bridger* (6), under the Mortmain Act, 1891. Those authorities show that the Court in considering questions of this kind must construe the will as operating at the death of the testator. Subsequent legislation cannot alter the construction of the will, though it may alter its legal effect: *In re Turnbull.* (7) *In re Rayer* (8) is against our contention, but that case does not appear to have been fully argued on the point and is no authority upon it. *In re Parker-Jervis* (1) was the case of a settlement, which is very different to a will. It rested on contract. Since the Wills Act relative and conflicting rights as between beneficiaries under a will must be ascertained at the death of the testator unless it is otherwise expressly directed.

The time for ascertaining the duty to be paid is the death of the testator or the payment over of the legacy. When that has been done the legatee cannot ask for further duties to be paid. The legacy was in effect paid over when the trustees made the appropriation of investments to satisfy it. [*Berry* v. *Gaukroger* (1) was also cited.]

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(1) [1898] 2 Ch. 643.

(2) [1915] 2 Ch. 179.

(3) (1872) L. R. 14 Eq. 419; 8 Ch. 192.

(4) (1879) 11 Ch. D. 681.

(5) (1884) 27 Ch. D. 166.

(6) [1894] 1 Ch. 297.

(7) [1905] 1 Ch. 726.

(8) [1903] 1 Ch. 685.

Romer, K.C., and *W. E. Tyldesley Jones*, for the respondent on the cross-appeal. As to the legacy of 25,000*l.*, it is said that the principle was laid down by Eve J. in *In re Snape.* (2)

[LORD COZENS-HARDY M.R. I do not think any general principle is established by that case.]

Upon construction, then, the intention of the testator was to free the legacy from all duties so that there should be no reduction of income available for the maintenance of the person entitled in remainder after the death of his widow. Clause 13 of the will frees the legacy from the estate duty notwithstanding that it was imposed after the testator's death. *Berry* v. *Gaukroger* (1) does not apply.

As to the duty in respect of the annual sum of 3000*l.*, see *Earl Cowley* v. *Inland Revenue Commissioners.* (3)

J. E. Harman, for the executors.

Cur. adv. vult.

June 3. LORD COZENS-HARDY M.R. This originating summons raises two questions upon the will of a testator as affected by the Finance Act, 1914. He died in October, 1913, leaving a very large fortune. His widow took an annuity of 12,000*l.* for her life. He devised his Berkshire real estates, after his widow's death, to his nephew Ronald William Poulton and his issue in strict settlement, with remainder to his nephew Eustace Exall Palmer and his issue in strict settlement, with remainder over. And he gave to his trustees the sum of 25,000*l.* and directed the income thereof during the life of his widow, or at the expiration of twenty-one years from his death, to be paid to the person who would be entitled as tenant for life or in tail to the possession or receipt of the rents and profits of the Berkshire estates if his widow were then dead, and after her death the fund was to fall into, and form part of, the settled residue. The nephew Ronald died a bachelor in May, 1915. On December 3, 1913, the trustees appropriated certain securities of the value of 25,000*l.*, and thenceforward the income was paid direct to Ronald,

(1) [1903] 2 Ch. 116.
(2) [1915] 2 Ch. 179.
(3) [1899] A. C. 198.

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and after his death to Eustace. Estate duty and settlement estate duty were paid out of the testator's estate, and, according to the Finance Act, 1894, this payment of settlement estate duty exempted the 25,000*l.* from estate duty until some person became able to dispose of the corpus. This exemption was taken away by s. 14 of the Finance Act, 1914. Estate duty was paid by the testator's executors on the death of Ronald; and the first question is how, as between the beneficiaries, this estate duty ought to be borne. Eustace says it ought to be borne by the residuary estate, and Younger J. has so decided. In my view there is no general principle which can be relied upon. A testator may use language which is sufficient to cover a duty not in force at his death, and in one at least of the clauses of his will the testator in this case has done so. His intention must be found from the language of the will.

Now clause 13, which follows the gift of the 25,000*l.*, is as follows: "I declare that all the legacies annuities and bequests whatsoever hereinbefore given or made and all legacies annuities and bequests which may be given or made by any codicil hereto shall be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees or annuitants entitled thereto respectively under the preceding clauses of this my will." I think the date of payment or handing over is the critical date. When once the executors have paid all duties exigible at that date the operation of clause 13 is ended. The 25,000*l.* was, in effect, "handed over" by the executors to themselves as trustees on December 3, 1913. This was a perfectly proper act, and none the less so because the beneficiaries under the trust could not have enforced payment from the executors before the end of twelve months. In my opinion the estate duty on the 25,000*l.* must be paid out of the investments representing the 25,000*l.*, and not out of the residue.

The second question relates to a gift in clause 22 of the will, where the testator directs the trustees out of the income of the settled residuary personal estate to pay an annual sum of 3000*l.* to the person who under the limitations of the Berkshire estates would for the time being, and from time to time, be entitled thereto as tenant for life or tenant in tail if his wife were then dead.

On Ronald's death estate duty was claimed, and paid by the executors, in respect of the 3000*l.* a year on "a notional sum" of 75,000*l.*, subject to certain deductions upon which no question arises. This proceeds plainly upon s. 2 (*b*), and not upon s. 1 of the Finance Act, 1894. It is not for us to consider whether the view of the Commissioners was correct. We must assume its correctness, and consider how the amount ought to be borne as between beneficiaries. The Commissioners treated the 3000*l.* payable to Ronald as an annuity which ceased on his death (s. 7, sub-s. 7), to be followed by a subsequent annuity of the like amount payable to Eustace. They then applied s. 7, sub-s. 7 (*b*), a sub-section which is so obscure as to be almost unintelligible. But I accept the method by which the figure was arrived at. 75,000*l.* is a purely fictitious sum, or a "notional sum." The annuity was chargeable upon the whole residue, and not upon any particular 75,000*l.* No charge can be given under s. 9 upon a non-existing fund. It is the whole residue which has derived benefit from the cessation of the annuity, and the burthen upon the income of the residue must be apportioned on the footing of s. 14, or in accordance with general principles which lead to the same result. In my opinion there is no justification for throwing the whole duty upon an imaginary 75,000*l.*, with the consequence that the annuitant would have to pay the full interest on the amount paid. The annuitant must bear his rateable proportion only, in accordance with Kekewich J.'s rule in *In re Parker-Jervis.* (1) The figures will, I presume, be arranged. I should say that clause 13 of the will has no bearing upon this question.

The declaration made by Younger J. on both points must be varied.

PICKFORD L.J. This is an appeal from Younger J. raising questions as to the duties payable by the testator's estate consequent upon the death of his nephew. The testator died in October, 1913, and by his will left his Berkshire real estates to his wife for life, and after her death to his nephew Ronald William Poulton and his issue in strict settlement, with remainder to Eustace Exall Palmer, with remainders over. With the object of providing an income during the life of his widow for the person entitled in reversion to his

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(1) [1898] 2 Ch. 643.

Berkshire property he left a sum of 25,000*l.* by the following clause of the will: "I bequeath to the persons hereinbefore appointed to be the trustees hereof the sum of 25,000*l.* upon trust that my trustees shall at their discretion invest the same in their names in any mode of investment hereinafter authorised with power for my trustees at their discretion from time to time to vary such investments or any of them within the authorised range and shall stand possessed of the said sum of 25,000*l.* and of the investments for the time being and from time to time representing the same Upon trust during the life of my said wife to pay the income arising therefrom to the person who under the limitations of the settled hereditaments hereinafter contained would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of the settled hereditaments if my said wife were then dead but without regard to the provision for cesser or shifting of estates hereinafter contained And from and after the death of my said wife I direct that the said sum of 25,000*l.* and the investments representing the same shall fall into and form part of the settled residue (hereinafter defined) and so as to form one fund therewith for all purposes but not so as to increase or multiply charges or powers of charging." The first question relates to this sum of 25,000*l.* Ronald Poulton, who had taken the name of Palmer, died in May, 1915, a bachelor, and according to the Finance Act, 1914, estate duty became payable in respect of this sum of 25,000*l.*, credit being given for settlement estate duty which had been paid under the Finance Act, 1894. This duty was paid by the testator's executors, and the first question is whether it is to be borne by the securities representing the sum of 25,000*l.* or by the residuary estate. This depends upon the construction of clause 13 of the will, which has already been read.

It was contended, on the one hand, that the operation of this clause was confined to duties in existence at the time of the testator's death, and for this the case of *In re Snape* (1) was cited. It was contended, on the other hand, that it extended to all duties which came into existence while the fund was in the hands of the trustees until on the death of the testator's widow it became part of the residue. No general rule for the interpretation of a clause freeing legacies from duty can, in my opinion, be laid down; the decision must rest in each case upon the words of the particular clause. In this case I think the time at which the duties are to be ascertained is when the bequests are handed over or paid. They are to be handed over or paid free of all duties and deductions, &c., and that must, in my opinion, mean duties existing at that time. I do not see how that can be otherwise in the case of the other bequests left by the will, and the only reason for making any difference in this case can be that it never is handed over or paid until on the widow's death it falls into the residue. I do not think this is so. If the bequest were to other trustees it clearly would be handed over or paid to them, and I do not think it can make any difference that the bequest is to "the persons hereinbefore appointed to be the trustees hereof," i.e., the same persons who were also appointed executors. On December 3, 1913, the executors appropriated certain securities to themselves as trustees in satisfaction of this bequest, and from that time the income arising from those securities was paid to Ronald Poulton during his life, and after his death to E. E. Palmer. This was done perfectly bona fide and was a proper thing to do, and it amounted, in my opinion, to a handing over or payment just as much as if the trustees had been different persons from the executors.

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(1) [1915] 2 Ch. 179.

It was argued that as this duty came into existence before the expiration of twelve months from the testator's death, and the appropriation was made within that time, it was made prematurely, and that the rights of the parties must be ascertained at the end of the twelve months given to the executor to pay legacies. I do not agree with this contention; the executor is not bound to wait twelve months before he hands over or pays a legacy, and if, as in this case, he does so bona fide before the expiration of that time, the date of actual handing over or payment is the date to be taken in applying clause 13. I think, therefore, this duty must be borne by the securities representing the 25,000*l.*

The second question arises as to an annual sum of 3000*l.* mentioned in clause 22. That clause devises and bequeaths the residue of the testator's estate upon certain trusts, and then goes on as follows: "Upon trust that during the period of accumulation

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(meaning by such expression wherever the same is used in this my will the period commencing from my death and terminating at the expiration of twenty-one years from my death or at the previous death of my said wife or at such earlier time as my said wife shall by deed appoint and direct in this behalf) my trustees shall out of the income of the settled residue pay an annual sum of 3000*l.* to the person who under the limitations of the settled hereditaments hereinbefore contained would for the time being and from time to time be entitled as tenant for life or tenant in tail male or in tail to the possession or receipt of the rents and profits of the settled hereditaments if my said wife were then dead." Upon Ronald Poulton's death estate duty was paid calculated upon a notional sum or slice of 75,000*l.* out of the testator's estate taken to be the amount of capital represented by the annual sum of 3000*l.* This evidently regards the duty as payable under s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and we must on this summons take it as rightly so paid on an annuity which ceased on Ronald Poulton's death when a different annuity payable to E. E. Palmer came into existence. The notional sum only comes into existence to ascertain under s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7 (*b*), the amount to which the estate has benefited by the cesser of Ronald Poulton's annuity, and it has no existence in fact as a separate fund, as is shown by its being called a notional sum. It cannot, therefore, be correct, in my opinion, as was argued by the respondents, that s. 9, sub-s. 1, charges the duty upon this notional sum of 75,000*l.*, with the result of making the annuitant bear the whole of the interest upon the amount paid. Sect. 9 is for the purpose of giving the Crown the benefit of a first charge upon the property liable to pay the duty, and it cannot be applied to give a charge only upon something which has no separate existence at all. The annuity was charged upon the whole estate, and the residue, the whole of which derives benefit from its cesser, must pay the duty, and it will be apportioned as described by the Master of the Rolls in accordance with *In re Parker-Jervis.* (1)

NEVILLE J. With regard to the duties payable in respect of the legacy of the 25,000*l.*, I think the question is purely one of construction of the will. To construe the will I think the right course is to read the whole will, or such parts as are material to the matter in hand, and, if the words used convey an intelligible meaning, to give effect to them unless prohibited by some rule of law. Dealing with the will in this manner, the meaning is, I think, fairly plain. Clause 13 declares that all legacies thereinbefore given shall be handed over or paid free of all duties and deductions in respect of duties to the legatees entitled thereto. Now it seems to me that so soon as the trustees have handed over or paid a legacy free of all the duties then charged upon it, or payable in respect of it, they have exhausted their duties under clause 13. I cannot see anything in this clause giving the legatee any further claim against the trustees in case further duty should be subsequently imposed. But it is said that in the present case there has been neither handing over nor payment, and this is, in one sense, true, for, inasmuch as the legatees of the trust legacy were the same persons as the trustees of the will, no actual handing over or payment was possible. On December 3, 1913, however, the trustees set apart and appropriated investments in satisfaction of the legacy, and from this time these investments ceased to be part of the general estate, and the risk of them fell upon the persons beneficially entitled to the legacy. I think that this was equivalent to payment, and that no subsequent imposition of duty can give the legatees any further right under the will. Indeed, if appropriation is not equivalent to handing over or payment, then, as it appears to me, clause 13 does not apply to this legacy at all, and it is not exonerated from any duty.

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(1) [1898] 2 Ch. 643.

With regard to the annual sum of 3000*l.*, it appears to me that the duty was assessed and paid under s. 2, sub-s. 1 (*b*), and that all the Court can do is to determine upon that footing the ultimate incidence of the duty. For this purpose we must consider both s. 2, sub-s. 1 (*b*), and s. 7, sub-s. 7 (*b*), with the result, in my opinion, that the recipient of the annual sum will have to pay interest upon such a sum as represents the proportion borne by the notional sum of 75,000*l.* to the residuary estate of the testator. In my opinion s. 9, sub-s. 1, does not apply to the present case.

Solicitors: *Waterhouse & Co.*

G. A. S.

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June 23.

In re BOYER'S SETTLED ESTATES.

[1915 B. 3244.]

Settled Estate—Will—Direction to allow Children to occupy House while unmarried—Tenancy for Life—Persons having Powers of Tenant for Life—Settled Land Act, 1882 (45 *&* 46 *Vict.* c. 38), *s.* 2, *sub-s.* 5; *s.* 58, *sub-s.* 1 (vi.).

At the dates of his will and death testator was lessee for a long term of a house called "The Grange," which he and his wife and family occupied at the same two dates. By his will testator devised "The Grange" specifically to his trustees, upon trust to permit his wife during her life to occupy it, she paying all rents, rates, taxes, assessments, and outgoings in respect of it, and observing and performing the covenants on the part of the lessee contained in the lease thereof, and with permission also to use and enjoy the testator's effects in "The Grange." And testator provided that after her death the trustees were to hold "The Grange" upon trust to permit "such one or more of my children who shall for the time being be unmarried and shall desire to reside in 'The Grange,' to occupy 'The Grange,' and use and enjoy my effects in 'The Grange' so long as any one or more of my said children shall remain unmarried and shall desire to reside there, he, she or they paying all rents, rates, taxes, assessments and outgoings in respect of 'The Grange,' and observing and performing the covenants on the part of the lessee contained in the said lease thereof." Then the will declared that, after the marriage of all the testator's children or the death of the last unmarried child, or in case all the unmarried children should notify to the trustees their desire not to reside in "The Grange," the trustees should hold "The Grange" and the effects therein upon similar trusts in favour of a married son, S., to those thereinbefore declared in favour of testator's wife. Then followed a similar provision (after a provision for S.'s children) for H., another son of the testator.

After the deaths of testator and his widow, X. and Y. were the two youngest and the only unmarried children of the testator. They resided together at and expressed their desire to continue to reside at "The Grange," and raised the question whether they were tenants for life of that property within the meaning of the Settled Land Acts and entitled to exercise the powers given to tenants for life by the Acts:—

Held, that X. and Y., although not strictly tenants for life within the meaning of s. 2, sub-s. 5, of the Settled Land Act, 1882, had, under s. 58, sub-s. 1 (vi.), of that Act, the powers given by the Act to tenants for life.

Sect. 58 of the Act is to be interpreted broadly, and includes persons who fall within the definition in s. 2, sub-s. 5, of a tenant for life.

WILLIAM BOYER, described in his will (dated November 5, 1901) as "of 'The Grange,' Harlesden, in the county of Middlesex," by that will appointed his wife, Eliza Boyer, his sons Samuel William Boyer and Henry Boyer, and his son-in-law Edward Alexander Collins executors and trustees of the will. Then he gave to his wife certain plate and other things "except my plate, plated articles, linen, china, glass, books, pictures, prints, carriages, vehicles, horses, furniture, cows, poultry and other live stock, greenhouse and other plants, gardening and husbandry implements, domestic animals, and all other articles of household or domestic use or ornament which shall be in or about my dwelling-house known as 'The Grange,' Acton Lane, Harlesden, in the county of Middlesex, or in the stables, coach-houses and outbuildings thereof, or in the garden and land occupied by me therewith, which excepted articles are hereinafter referred to by me as my effects at 'The Grange.'" After a few other legacies the will proceeded as follows: "I bequeath to my trustees my leasehold land at Willesden [*sic*] in the county of Middlesex, containing two acres or thereabouts, with the messuage known as 'The Grange,' stables and buildings erected thereon, and all other the premises comprised in the lease dated" August 9, 1888, made between certain named persons of the one part "and myself of the other part," for ninety-nine years from March 25, 1888, at the yearly rent of 60*l*. ("all which are hereinafter referred to as 'The Grange'), Together with my effects at 'The Grange,' Upon trust to permit and suffer my said wife, during her life, to occupy 'The Grange,' she paying all rents, rates, taxes, assessments, and outgoings in respect of 'The Grange' and observing and performing the covenants on the part of the lessees contained in the aforesaid lease thereof, and to use and enjoy my effects at 'The Grange' . . . . And, after her death, upon trust to permit such one or more of my children who shall for the time being be unmarried, and shall desire to reside in 'The Grange,' to occupy 'The Grange,' and to use and enjoy my effects at 'The Grange,' so long as any one or more of my said children shall remain unmarried and shall desire to reside there, he or she or they paying all rents, rates, taxes, assessments and outgoings in respect of 'The Grange,' and observing and performing the covenants on the part of the lessee contained in the said lease thereof." Then the will proceeded as follows: "And, after the marriage of all my children, or the death of my last unmarried child, whichever shall first happen, or all my unmarried children shall give notice in writing to my trustees that none of them desire to reside in 'The Grange,' I declare that my trustees shall hold 'The Grange' and my effects at 'The Grange' upon similar trusts in favour of my said son Samuel William Boyer to those hereinbefore contained concerning the same in favour of my said wife. And I further declare that my trustees shall, after the death of the survivor of them, my said wife and my said last mentioned son, hold 'The Grange' and my effects at 'The Grange,' Upon trust for such first son of my said son Samuel William Boyer who shall survive my said wife and my said son and who shall have attained or shall thereafter attain the age of twenty-one years; and, if there shall be no such son, then upon similar trusts, for my said son Henry Boyer and his sons, to those hereinbefore declared in favour of my said son Samuel William Boyer and his sons."

Testator died on October 14, 1914, and his will was proved soon afterwards by his widow, his sons S. W. Boyer and Henry Boyer, and Edward A. Collins.

The widow died on February 1, 1909, and at that date the only unmarried children of the testator were Beatrice Boyer and Herbert Boyer.

S. W. Boyer was married once only, namely, in September, 1896, and Gordon W. Boyer (born in August, 1897) was the only son of that marriage.

Henry Boyer was married once only, namely, in October, 1895, and Henry J. M. Boyer (born in 1896) was the only son of that marriage.

Beatrice Boyer and Herbert Boyer took out an originating summons, under the Settled Land Acts, 1882 to 1890, against Samuel W. Boyer, Henry Boyer, E. A. Collins, Gordon W. Boyer, and Henry J. M. Boyer, asking for a declaration that Beatrice and Herbert together constituted the tenant for life under the settlement created by the will, and that as such they were entitled to exercise the powers conferred upon tenants for life by the Settled Land Acts.

Paragraph 6 of Herbert Boyer's affidavit in support of the summons was as follows: "The said Beatrice Boyer and I claim together to constitute the tenant for life of 'The Grange,' within the meaning of the Settled Land Acts, 1882 to 1890, and we desire, as such tenant for life, to be in a position to sell or lease 'The Grange' if a favourable opportunity for so disposing thereof should occur, and we claim to receive the income produced by the investment of the purchase-money in case of a sale, or the rents and profits in case of a lease so long as we shall respectively remain unmarried, and to have the use of and enjoyment of 'the effects at The Grange' during the same period. And, if the Court should declare that we are so entitled as claimed by us, we propose forthwith to put up the settled hereditaments for sale by public auction; but, if it should be held that we are not entitled, as such tenant for life as aforesaid, we desire to continue our present occupation of 'The Grange' and to have the use and enjoyment of 'the effects at The Grange' under the trusts in that behalf contained in the said will."

A. Grant, K.C., and *F. E. Ward*, for the applicants. By s. 3 of the Settled Land Act, 1882, "A tenant for life—(i.) May sell the settled land, or any part thereof." Sect. 2, sub-s. 5, provides that "The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this Act the tenant for life of that land, and the tenant for life under that settlement." By s. 58, sub-s. 1, "Each person as follows shall, when the estate or interest of each of them is in possession, have the powers of a tenant for life under this Act, as if each of them were a tenant for life as defined in this Act (namely): . . . . (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose." The applicants are tenants for life, and until they marry, or both of them have given notice that they do not desire to live at "The Grange," they can sell it: *In re Carne's Settled Estates* (1); *In re Eastman's Settled Estates* (2); *In re Baroness Llanover's Will* (3); Wolstenholme's Conveyancing and Settled Land Acts, 10th ed. p. 369. If the applicants are not strictly tenants for life, they have, under s. 58, sub-s. 1 (vi.), the powers of a tenant for life.

Romer, K.C., and *P. F. Stokes*, for all the respondents except Collins. The applicants are not tenants for life, for they are not within the words of s. 2, sub-s. 5. It is difficult to find how they have any estate; they have only a permission to reside, and that does not make them tenants for life: *May* v. *May* (4); *In re Paget's Settled Estates.* (5) The applicants now show that they want to sell and not to occupy "The Grange."

The applicants have not the powers of a tenant for life under s. 58. The persons referred to in sub-s. 1 (vi.) of s. 58 are a narrower class than those referred to in s. 2, sub-s. 5, and do not include persons who are for the time being beneficially entitled to the possession of the settled land, for such a person is not "a tenant for his own or any other life" and has no "estate" which "is liable to cease in any event." The definition in s. 2, sub-s. 5, is of a "tenant for life," but s. 58, sub-s. 1 (vi.), refers to "a tenant for his own or any other life," and not to a tenant for life as previously defined. [They also referred to *In re Hazle's Settled Estates* (6), *In re Bond's Estate* (7), and *In re Edwards' Settlement.* (8)]

A. Grant, K.C., in reply. The applicants, if not tenants for life, are persons who have the powers of tenants for life. The Act was passed to prevent property being in the dead hand—to stop it from being too long tied up by settlements. To come within s. 58, sub-s. 1 (vi.), a person need not be a "tenant" in the strict legal sense. It is enough if he is "beneficially entitled to possession" and his interest is liable to cease in his lifetime by the occurrence of some event within s. 58, sub-s. 1 (vi.). In *In re Baroness Llanover's Will* (9) Romer L.J. says: "The policy of the law is to regard the provisions of the Settled Land Acts as being beneficial, and not to cut down the class of persons, or the number of persons, coming within the definition of 'tenant for life.'" *May* v. *May* (1) was not a decision under the Settled Land Act. In *In re Bond's Estate* (2) there was a mere right to select one of several houses.

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(1) [1899] 1 Ch. 324.
(2) [1898] W. N. 170.
(3) [1903] 2 Ch. 16.
(4) (1881) 44 L. T. 412.
(5) (1885) 30 Ch. D. 161.
(6) (1885) 29 Ch. D. 78.
(7) (1904) 48 Sol. J. 192.
(8) [1897] 2 Ch. 412.
(9) [1903] 2 Ch. 24.

H. Hull, for the defendant Collins, took no part in the argument.

SARGANT J. The principal question which I have to decide is whether two of the testator's children, who are in fact occupying his house called "The Grange" under the terms of a clause in his will, are tenants for life of that property. The testator possessed in "The Grange" a considerable property, which, besides a house, included land of about two acres, all of which was held by him under a long lease. Some small portion of the property was let off, so that it was not in his occupation, and would not fall into the occupation of anybody under his will until the termination of that sub-tenancy. By his will he gave "The Grange" specifically to his trustees, upon trust to permit and suffer his wife during her life to occupy "The Grange," "she paying all rents, rates, taxes, assessments, and outgoings in respect of 'The Grange,' and observing and performing the covenants on the part of the lessee contained in the aforesaid lease thereof"; and then he provided that she might use and enjoy his effects therein. As far as the wife is concerned, it is quite clear that, on her taking occupation under that permission, she became tenant for life of "The Grange," and entitled, I think, probably to receive the rents and profits. At all events, she was the tenant for life of it within the meaning of the Settled Land Acts. The testator went on to provide that after her death the trustees were to hold "The Grange" "upon trust to permit such one or more of my children who shall for the time being be unmarried, and shall desire to reside in 'The Grange' to occupy 'The Grange' and use and enjoy my effects in 'The Grange' so long as any one or more of my said children shall remain unmarried and shall desire to reside there, he, she, or they paying all rents, rates, taxes, assessments, and outgoings in respect of 'The Grange,' and observing and performing the covenants on the part of the lessee contained in the said lease thereof." It is observable that those words are precisely the same words as those used in the will in respect of the occupancy by the widow; and, although one condition on which the children are to occupy is a condition of their desiring to reside, what is given to them in terms is, not the right of residence, but the right of occupation—the right to occupy "The Grange." Then the testator declares that after the marriage of all his children, or the death of his last unmarried child, or in case all his unmarried children "shall give notice in writing to my trustees that none of them desire to reside in 'The Grange,'" the trustees are to hold "The Grange" and the effects upon similar trusts, in favour of his son Samuel William Boyer, to those thereinbefore contained concerning the same in favour of his wife—so that again, when you come to the estate in reversion of the son Samuel William Boyer, he clearly becomes tenant for life. I need not go on further with the will for the purpose of interpreting it, but there is a similar provision, after a provision for the children of Samuel William Boyer, for his brother Henry Boyer, a son of the testator.

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(1) 44 L. T. 412.

(2) 48 Sol. J. 192.

Now, as the argument has proceeded before me, I have first to decide whether the persons who are given the rights of a tenant for life under s. 58 of the Settled Land Act, 1882, and particularly under sub-s. 1 (vi.) of that section, are all the persons who, apart from the question of duration of interest, would be entitled to be considered tenants for life under s. 2, sub-s. 5, of the Act. Under s. 2, sub-s. 5, a person is to be considered tenant for life of the land "who is for the time being, under a settlement, beneficially entitled to possession of settled land for his life"; and the two applicants, a son and a daughter of the testator, who have intimated their desire to reside at the house and are now occupying it, seem to me to be persons under the provisions of the will beneficially entitled to possession of the settled land, and to conform so far to the definition in s. 2, sub-s. 5. But they are not in fact tenants for life because they do not hold for their lives, and therefore do not come within s. 2, sub-s. 5. And when I come to what is practically the extension of that section, at any rate as regards the persons entitled to exercise the powers given to tenants for life, namely, the extension contained in s. 58, sub-s. 1 (vi.), the first point that Mr. Romer puts to me is that the powers are not given to persons who are for the time being beneficially entitled to the possession of settled land,—to go back to the phrase in s. 2, sub-s. 5,—but "to a tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise," and so on. And accordingly as I understand his argument, Mr. Romer says that the persons defined in the definition in s. 58, sub-s. 1 (vi.),—I am not dealing with the duration of interest—are a narrower class than the class of persons within s. 2, sub-s. 5.

As far as I know, that argument is a new one. I have not observed that it has been raised in any of the cases which have been cited to me, and, in my judgment, it is not correct and would have a hampering and narrowing effect on the interpretation of legislation which ought in my judgment to be interpreted broadly. I think that the effect of s. 58 is, broadly speaking, to give to the large class of persons comprised in the nine headings of sub-s. 1 of s. 58 the powers of a tenant for life, although they are not strictly tenants for life by reason of their estates not being strictly estates for life. But, apart from that, I think that the persons who are dealt with under s. 58 are persons who fall within the general defining provisions of s. 2, sub-s. 5, under which in determining tenancy you have to regard beneficial title to possession. It is true that in that sub-section it is not tenancy in general but tenancy for life only that is mentioned. But this is obviously because that is the general class of tenancy with which the Act is dealing. It seems to me absurd to say for instance that a person not strictly tenant in tail but entitled to beneficial possession as tenant in tail is not within s. 58, sub-s. 1 (i.). If that is so, and if I am right in my view that the two applicants are at the present time beneficially entitled to possession of this settled land, then I think that they are brought within s. 58, sub-s. 1 (vi.), because they are persons "whose estate is liable to cease" "by conditional limitation," that is, by way of a limitation under which they take, not during the whole of their lives, but only during the period for which they continue to occupy in pursuance of their desire, and of course continue also unmarried.

It seems to me that all the cases that have been cited tend in that direction—and particularly *In re Paget's Settled Estates* (1), *In re Eastman's Settled Estates* (2), and *In re Baroness Llanover's Will* (3)—except the two cases of *May* v. *May* (4) and *In re Bond's Estate.* (5) In *May* v. *May* (4) the Settled Land Act was not in question. The learned judge there took the view, or at any rate the only decision was, that the lady who had the right of residence was not entitled to get the rents when the property was let and was not entitled to let the property. In *In re Bond's Estate* (5) the main reason, as it seems to me, why Swinfen Eady J. came to the decision he did was that there a right of occupation was given first in respect of any one of a rather indefinite number of houses—I think something like twelve houses. It is to be observed that Swinfen Eady J. was himself the judge who had decided one of the other cases to which I have been referred—*In re Baroness Llanover's Will* (3)—in a broad spirit of interpretation, and I do not think that he meant in *In re Bond's Estate* (5) to go back on anything he had previously decided. At any rate I think that *In re Bond's Estate* (5) rested mainly on the ground which I have stated, and that it is not a conclusive authority.

In my judgment, when once these two children, the applicants, had expressed their desire to occupy and had become entitled to the right of occupation, they from that time forward were persons beneficially entitled to possession of the land, their beneficial title to possession was for the purposes of this legislation tenancy, and they were accordingly brought within the precise terms of s. 58, sub-s. 1 (vi.).

[His Lordship also held that the trustees of the will were trustees for the purposes of the Settled Land Acts. As regarded the portion of the property which was sub-let, there was a declaration that there was a tenancy in respect thereof which prevented the powers of the tenants for life being exercisable in respect thereof during the tenancy.]

Solicitors: *Collins & Co.; Dod, Longstaffes & Co.*

(1) 30 Ch. D. 161.
(2) [1898] W. N. 170.
(3) [1903] 2 Ch. 16.
(4) 44 L. T. 412.
(5) 48 Sol. J. 192.

F. E.

In re GARNHAM.

TAYLOR *v.* BAKER.

[1915 G. 1421.]

NEVILLE J.

1916

June 5.

Will—Rule against Perpetuities—Gift of Real Estate to Bachelor for Life—Remainder to any Woman he may marry for Life—Remainder to his Children in Equal Shares—Conversion—Discretionary Power of Sale during Lives of Tenants for Life—Trust for Sale after Death of Son's Wife.

A devise of real estate in trust for a bachelor or spinster for life, with remainder in trust for any wife or husband he or she may marry for life, with remainder to his or her children, is not void for perpetuity because the class of children to take must be ascertained at the death of the first tenant for life, and the interpolation of a life interest to an unascertained person cannot make any difference. But a trust for sale which does not arise until after the death of the unascertained wife or husband is void for perpetuity and does not effect a conversion. Therefore, if there is no other trust for sale, the children take the real estate as unconverted.

In re Bullock's Will Trusts [1915] 1 Ch. 493 followed.

In re Frost (1889) 43 Ch. D. 246; *Whitting* v. *Whitting* (1908) 53 Sol. J. 100; and *In re Park's Settlement* [1914] 1 Ch. 595, not followed.

THOMAS GARNHAM by his will, dated March 29, 1837, devised his real estate to trustees upon trust during the life of his eldest son, Thomas, and after his death until the same should be sold under the trusts thereinafter declared, to demise the same as therein mentioned, and to pay the rents thereof to his son for life and after his death to any woman whom his son should marry during her life, and upon further trust with all convenient speed after the decease of his said son and such wife of his said son and the survivor of them or in the lifetime of his said son and his wife or the survivor of them, if his trustees should think proper, to sell the real estate and to stand possessed of the proceeds upon trust for the children of his said son Thomas at twenty-one or marriage as therein mentioned; and in the event of there being no such child (which event happened), in trust for the testator's other children who should survive his said son Thomas and the children or child then living of any of the testator's children who should have died in the lifetime of Thomas

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leaving children, in equal shares per stirpes. The testator died in 1838 and his will was proved in 1839. His eldest son, Thomas, was a bachelor at the testator's death, but was afterwards twice married. The date of his first marriage was unknown, but he married his second wife in 1867 and died in 1872. There was no issue of either marriage. The second wife of Thomas survived him and died in 1895. The testator left six children other than his son Thomas, of whom one survived Thomas and one died in his lifetime leaving children who survived him; the other four died in Thomas's lifetime without leaving children who survived him. The trustees attempted from time to time to sell the real estate without success, but in 1915 it was sold to the Corporation of London.

The trustees took out this summons for the determination (inter alia) of the questions (1.) whether the trusts declared by the will of the real estate after the deaths of the son Thomas and any woman with whom he might intermarry, and failure of issue of the marriage, were valid or void as being within the rule against perpetuities; and (2.) whether by reason of the trust for sale the real estate was by the will absolutely converted into personalty.

L. Mossop, for the trustees.

Jenkins, K.C., and *C. G. Church*, for the testator's surviving child and some of his grandchildren. Although the gift to the testator's other children and their children is in remainder after the death of Thomas's wife who might be unborn at the testator's death, the class to take can be ascertained at the death of Thomas, and, therefore, the gift is not bad: *Evans* v. *Walker* (1); *In re Bullock's Will Trusts* (2); *In re Norton.* (3) But there is no valid trust for sale until after the death of Thomas's wife, and, therefore, there is no conversion, and the persons who take in remainder take as real estate: *Goodier* v. *Edmunds* (4); *In re Daveron* (5); *In re Appleby.* (6) Very much the same persons take whether there is a conversion or not, but our clients take rather a larger share if it is real estate.

Ward Coldridge, K.C., and *Leeke* (for *H. S. Howard*, serving with

(1) (1876) 3 Ch. D. 211.
(2) [1915] 1 Ch. 493.
(3) [1911] 2 Ch. 27.
(4) [1893] 3 Ch. 455.
(5) [1893] 3 Ch. 421.
(6) [1903] 1 Ch. 565.

His Majesty's Forces), for other grandchildren (who would take a larger interest if the real estate were converted). The gift is valid but the trust for sale is absolute, and the intention that there should be a conversion is clear. *Attorney-General* v. *Dodd* (1) shows that a mere discretion as to time of sale does not prevent there being an absolute conversion.

Beebee, for other parties in same interest.

Swords, for the heir-at-law. There is an intestacy here; a limitation to a person who may never exist is void, and there cannot be a valid gift in remainder after a gift to an unborn person for life. That rule is absolute: *Whitby* v. *Mitchell* (2); *Whitting* v. *Whitting* (3); *In re Park's Settlement* (4); *In re Hewett's Settlement.* (5)

In re Bullock's Will Trusts (6) was really the same case as *In re Park's Settlement* (4), but Sargant J. suggested a distinction on the ground that the gift to the children might be construed as an independent gift. Such a gift after a void limitation is never construed as an independent gift: *Beard* v. *Westcott* (7); *In re Thatcher's Trusts* (8); *In re Abbott* (9); *In re Hewett's Settlement.* (5)

There is no trust for sale until after the death of Thomas's wife, so the heir takes as real estate.

NEVILLE J. There are two points arising in the present case. The first is, what is the result, with regard to the rule against perpetuities, of a gift to a bachelor for life with remainder to any wife he may marry with remainder to his children? There has apparently been a difference of judicial opinion on that point. We have first a case before Kay J. of *In re Frost* (10), and that is followed by *Whitting* v. *Whitting* (3), a decision of my own, in which I seem to have dealt with the will before me very much in the way in which Kay J. dealt with the will before him in the case of *In re Frost.* (10) The gifts were obviously bad on the face of them under the rule against perpetuities, because the limitation was

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(1) [1894] 2 Q. B. 150.
(2) (1889) 42 Ch. D. 494; (1890) 44 Ch. D. 85.
(3) 53 Sol. J. 100.
(4) [1914] 1 Ch. 595.
(5) [1915] 1 Ch. 810.
(6) [1915] 1 Ch. 493.
(7) (1822) 5 B. & Al. 801.
(8) (1859) 26 Beav. 365.
(9) [1893] 1 Ch. 54.
(10) 43 Ch. D. 246.

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to children at twenty-five in the case before Kay J. and at twenty-three in the case which I decided. There was a question in both cases whether in the circumstances it was a gift to the unborn children of an unborn person following on a life interest to that unborn person. Then came a decision of Eve J. in *In re Park's Settlement* (1), in which he purported to follow those two decisions, and finally the matter came before Sargant J. in the case of *In re Bullock's Will Trusts* (2), in which he held that such limitations were good. There is also a second point which he decided in the case before him, namely, that the gift in question was an independent gift, and not a gift in remainder.

Having considered the matter as carefully as I can, I have come to the conclusion that Sargant J.'s view is the sounder view on the point. I do not think that the fact that the children referred to might have been the children of an unborn person who took a tenancy for life as well as of the son, the bachelor, who took another tenancy for life, can affect the matter. It seems to me that upon the determination of the tenancy for life given to an existing person the class is ascertained, although the enjoyment may be postponed during a life tenancy of a person who may have been unborn at the date of the gift. In my opinion that does not offend against the rule against perpetuities. Consequently I propose to follow Sargant J.'s decision in this respect.

I may say that I have mentioned the matter to Eve J., and he agrees with me that *In re Bullock's Will Trusts* (2) is a sounder decision on this point than the decisions which preceded it.

The only remaining question I have to consider is whether there was a conversion of the estate prior to the determination of the tenancies for life. After considering the will, I cannot come to the conclusion that there was. It seems to me that there is a discretionary trust during the tenancies for life in the trustees, and that discretionary trust was not exercised. There is no positive trust for conversion until the determination of the life estates, and that positive trust is void for remoteness, and therefore fails. Therefore we are left with nothing but a discretionary trust for sale during the existence of the tenancies for life. It seems to me that that cannot amount to an actual conversion for all purposes of the testator's real estate. I think, therefore, that the gift over to the testator's other children and their descendants is a gift of real estate and not of personalty.

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(1) [1914] 1 Ch. 595.

(2) [1915] 1 Ch. 493.

Solicitors: *Poole & Robinson; Roy & Cartwright, for Herbert Spence Hawks, Hertford.*

J. R. B.

NEVILLE J.
1916
June 5, 6.

In re MUSGRAVE.
MACHELL *v.* PARRY.

[1915 M. 1764.]

Settled Land—Tenant for Life—Person having the Powers of a Tenant for Life—Tenants for Life subject to a Trust to accumulate all Rents for Ten Years and apply the same for making a Road—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 7; *s.* 58, *sub-s.* 1, *clause vi.—Bequest of Annuity "to be paid without deductions"—Income Tax—Payment by Trustees without deducting Income Tax—Mistake in Law—Right of Trustees to recoup themselves for Payments of Income Tax made by Mistake out of future Payments of Annuities.*

M. devised lands to four named grandsons as tenants in common for life with cross remainders between them, and directed that after the death of the survivor the same lands should fall into his residuary real and personal estate which was given upon other trusts. By a codicil the testator directed the trustees of his will to let the said lands by lease or otherwise and accumulate the rents for a period of ten years after his death and apply the accumulations towards the construction of a proposed carriage road over the Styhead Pass in Cumberland:—

Held, that the grandsons were, notwithstanding the term, persons who had the powers of tenants for life under the Settled Land Act, 1882, as being "a tenant for . . . . life . . . . whose estate . . . . is subject to a trust for accumulation of income for payment of debts or other purpose" and whose estate was in possession, within s. 58, sub-s. 1 (vi.), of the Settled Land Act, 1882.

By the same will the testator gave several annuities to his sons and others and directed that all annuities should be paid free of deduction. The trustees had paid the annuities for some years without deducting income tax:—

Held, that the annuities were not given free of income tax, but that the trustees were entitled to deduct the income tax they had paid out of residue from future payments of the annuities, on the ground that the Court will always in the administration of an estate, where possible, correct errors of account between trustees and cestuis que trust. The rule that a man cannot recover moneys paid under a mistake in law does not apply to such a case.

In re Ainsworth [1915] 2 Ch. 96 followed.

JOHN MUSGRAVE by his will, dated February 5, 1911, devised his house called Wasdale Hall and the land occupied therewith to his son John Raven Musgrave for his life on condition of residence as therein mentioned, and after his death or breach of the condition he directed that the same hereditaments should sink into and form part of his residuary estate. And after certain other specific devises to his sons and bequests of legacies and annuities, including annuities of 2000*l.* a year to each of his sons thereinbefore named, all which annuities he directed to be paid without deduction, he gave all the residue of his real and personal estate to trustees upon trust out of the income of his personal estate to pay the legacies and annuities thereinbefore given, and subject thereto to accumulate the residue of the income until the youngest of the then living children of his son John Raven Musgrave and of his daughter Grace Jennings Parry, living to attain the age of twenty-five years, should attain that age, and after the youngest of such children should attain that age to stand possessed of his residuary estate and the accumulations thereof for such of the children of his said son and of his said daughter as should have attained the said age and the children then living of any children of his said son and of his said daughter, then dead, in equal shares as tenants in common according to the stocks.

By a second codicil to his said will dated November 4, 1911, the testator revoked the devise of his Wasdale Hall estate to his son, John Raven Musgrave, and devised the same and also the farm lands and woods called Woodhow Farm, including the stock of sheep thereon, to his grandchildren, Thomas Harold Musgrave, Bertram Leigh Parry, Wykeham Parry, and Chandos Henry Parry, equally as tenants in common for life, with cross remainders between them; and on the death of the survivor of them he directed that his Wasdale Hall estate and Woodhow Farm should sink into and form part of his residuary estate.

By a fourth codicil to his will the testator directed the trustees or

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trustee for the time being of his will, notwithstanding anything contained in his said will or the first, second, or third codicils thereto, to let on lease or otherwise during the period of ten years from his death certain farms and lands, including the lands by his second codicil devised to his said four grandsons for life, and to accumulate at compound interest the rents thereof for the term of ten years from his death and to apply and appropriate the said accumulated rents in and towards the construction and maintenance of the intended carriage road over Styhead Pass from Wasdale Head village school to Borrowdale Valley, but if such road should not be made and constructed within ten years after his decease, then he directed that the said accumulated rents should sink into and form part of his residuary real and personal estate; and in all other respects he confirmed his said will and the first three codicils thereto.

The testator died on April 17, 1912. A caveat was entered against probate of the said will, but this was afterwards withdrawn, and the said will and codicils were duly proved on June 27, 1914.

On July 15, 1915, a summons was taken out by the trustees of the will for the determination, amongst others, of the questions: 1. What interest was given by the said fourth codicil of the testator to the trustees of his said will in the Woodhow Farm and the Wasdale Hall estate therein mentioned in the said codicil; 2. Whethe notwithstanding such interest, the defendants Wykeham Parry, Thomas Harold Musgrave, Bertram Leigh Parry, and Chandos Henry Parry were then tenant or tenants for life or had the powers of a tenant for life under the Settled Land Acts in respect of the said lands by the second codicil given to them for life; 8. Whether the annuities bequeathed by the said will "without deduction" were given free of income tax, and if not, whether the trustees or trustee were entitled to deduct payments already made out of the residuary estate in respect of such income tax from any payment of such annuities respectively becoming subsequently due or to be allowed such payments out of the residuary estate.

Jenkins, K.C., and *Kenneth Wood*, for the plaintiffs, the trustees. The testator by his second codicil unquestionably made his four grandsons tenants for life of his Wasdale Hall estate, but the question is whether the direction to his trustees, contained in the fourth codicil to his will, to lease that estate and accumulate the whole of the rents and apply the accumulations for making the proposed road, with a gift over of the accumulations to his residuary real estate which is not given to the said grandsons, prevents them being tenants for life in possession of that estate, or having the powers of tenants for life under the Settled Land Acts.

The question depends chiefly on the construction of s. 58, especially sub-s. 1 (vi.), which includes among the persons who are to have the powers of a tenant for life "A tenant for his own or any other life . . . . whose estate . . . . is subject to a trust for accumulation of income for payment of debts or other purpose."

In re Llewellyn (1) and *In re Beauchamp's Will Trusts* (2) show that a person may have the powers of a tenant for life though there is a trust for accumulation which for the time being or for some considerable time prevents his receiving anything from the property; but in those and all similar cases the trust for accumulation has been of the nature of an incumbrance. The tenant for life has always had the right to redeem. Where there is no such right, as where a testator gave property to trustees upon trust to manage for twenty years, accumulating the profits and applying them in purchasing real estate, and at the end of that term to settle the devised property and accumulations upon the trusts of an existing settlement under which his son was tenant for life, it was held that as the son took no interest during the term he was not a tenant for life in possession: *In re Strangways.* (3)

G. R. Northcote, for the four grandsons. Possession under the Act has a special meaning created by the Act. In *In re Money Kyrle's Settlement* (4) Cozens-Hardy J. (as he then was) held, following *In re Richardson* (5), that a tenant for life was entitled to be let into possession though his tenancy was subject to a term of 500 years vested in trustees to manage and apply net rents in paying off mortgages. Those cases were decided on the ground that the tenant for life was the only person who could sell or lease the land subject to the term. That applies here, as the term of ten years is part of the settlement; the tenants for life could sell free from the

(1) [1911] 1 Ch. 451.
(2) [1914] 1 Ch. 676.
(3) (1886) 34 Ch. D. 423.
(4) [1900] 2 Ch. 839.
(5) [1900] 2 Ch. 778.

term. If we are held not to have the powers, the object of the Act, which was to make settled property easily saleable, would be defeated.

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Jenkins, K.C., in reply.

NEVILLE J. The testator, by the second codicil to his will, deals with certain property. [His Lordship read the devise set out above, and continued :] There is no question that the grandsons there take a legal tenancy for life. Then comes the fourth codicil, which contains this somewhat curious provision : [His Lordship read that codicil, and continued :] The question that I have to decide is whether these persons who are made legal tenants for life take the powers of tenants for life under the Settled Land Acts, notwithstanding the fact that the trustees are directed to let for ten years and accumulate the rents for a particular purpose.

Similar questions have been before the Courts a good many times, and it seems to have been decided first of all that where there is a term which in a broad sense is for the purpose of providing for incumbrances, there the tenant for life is in the position indicated by s. 2, sub-s. 7, of the Settled Land Act, 1882, i.e., he is deemed to be a tenant for life " notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is incumbered or charged in any manner or to any extent." A case of that kind is *In re Richardson* (1), decided by Stirling J., and there have been several cases in which, where there has been a term for the purpose of accumulating an income for payment of debts, that has been held not to prevent the tenant for life being the tenant for life in possession within the meaning of s. 58, sub-s. 1 (vi.), of the Settled Land Act, 1882.

The only case in which it has been decided that a term for accumulation has stood in the way of the exercise of these powers by the tenant for life—in other words, has made the tenant for life not a tenant for life in possession—is *In re Strangways* (2), and it is necessary to examine that case rather closely to see whether the present case comes within the principle of that case or of the other cases which have been cited. *In re Strangways* (2) was a somewhat curious case, in which there was a devise to two trustees upon trust for twenty years "to accumulate or invest in the purchase of land the unapplied part of the rents, and after the determination of the said term of twenty years to settle and assure the devised and purchased real estate to the uses and upon the trusts" of an existing settlement under which the testator's son took certain estates as tenant for life. As I read the judgment of Cotton L.J., he came to the conclusion that there there was really no estate in the son at all until the expiration of the twenty years, when the settlement was directed. He considered whether the case was covered by the words "whose estate . . . . is subject to a trust for accumulation of income for payment of debts or other purpose"—that is what I have to consider here—and he says (1): "In my opinion in order to bring himself within that, he must show that he has an immediate estate—a present estate for life, but that present estate is only subject to a trust for accumulation." That seems to me to be the distinction between the present case and *In re Strangways*. (2) Here the tenants for life have a present interest; they are presently tenants for life subject only to a term of ten years for the purpose of accumulation, and, although it is not for payment of debts, it seems to me to be for "other purpose," and I do not think I should be right in limiting the generality of those words "other purpose" and saying that because the purpose here was to build a road therefore s. 58, sub-s. 1 (vi.), does not apply.

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(1) [1900] 2 Ch. 778.
(2) 34 Ch. D. 423.

In my opinion, therefore, the tenants for life are tenants for life in possession within the meaning of s. 58, sub-s. 1 (vi.), and of course are entitled to exercise the powers under the Settled Land Act.

On the eighth question:

W. Compton-Smith, for E. M. Parry, one of the sons of the testator's daughter, Mrs. Parry, to whom an annuity was given. It is settled that a gift of an annuity without deduction does not justify trustees in paying it free from income tax: see *Gleadow* v. *Leetham*. (3) The trustees have paid some of the annuities, including that to E. M. Parry, without deducting income tax, and claim to have the income tax paid by them recouped by the annuitants out of future payments. But sums paid by trustees in mistake of law cannot be recovered: *Pooley* v. *Ray* (1); *Warren* v. *Warren.* (2) The same rule is assumed in *In re Sharp.* (3)

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(1) 34 Ch. D. 431.
(2) 34 Ch. D. 423.
(3) (1882) 22 Ch. D. 269.

Butcher, K.C., and *Austen-Cartmell*, for another annuitant.

Jenkins, K.C., and *Kenneth Wood*, for the trustees. The cases cited have nothing to do with the question. The trustees would be liable to make good to the residuary legatees the sums they had overpaid to the annuitants; if the trustees were insolvent the residuary legatees could recover the amount from the annuitants, and the Court has always power in administering the estate to put right the accounts between the trustees and the annuitants. *Livesey* v. *Livesey* (4) is an authority exactly in point.

In *In re Horne* (5) Warrington J. refused to correct the mistake in favour of the executors of the trustee who had made it, who was himself the person interested in having the mistake corrected. But in *In re Ainsworth* (6) Joyce J. said that *In re Horne* (5) depended upon very peculiar circumstances and refused to follow it as establishing any rule that a mistake of this sort could not be corrected in favour of a trustee who was beneficially interested. In this case the trustees are not beneficially interested in the question.

Ward Coldridge, K.C., and *W. R. Sheldon; G. M. Hildyard, J. W. Manning*, and *R. H. Hodge* appeared for other parties.

NEVILLE J. It has been in my opinion the practice of the Court, when administering an estate of a deceased person in cases where trustees have under an honest mistake overpaid one beneficiary, in the adjustment of the accounts between the trustees and the cestui que trust, to make allowance for the mistake in order that the trustee may so far as possible be recouped the money which he has inadvisedly paid. I have been referred to a variety of authorities in which an application for the refunding of the money so paid has failed, and I think in the case of *Pooley* v. *Ray* (1), and in most of the other cases to which I have been referred, it has been because of the principle

(1) (1717) 1 P. Wms. 355.

(2) (1895) 72 L. T. 628; 43 W. R. 490.

(3) [1906] 1 Ch. 793.

(4) (1827) 3 Russ. 287.

(5) [1905] 1 Ch. 76.

(6) [1915] 2 Ch. 96.

that a man cannot recover money which he has paid under a mistake of law, and it has been held that the mistake as to the payment of the income tax was a mistake of law, or a misconstruction of the statutes. It may well be that these cases may still stand in modern times on that footing. Certainly that doctrine, so far from having been extended, has, I think, been very substantially limited in recent times, and in my opinion the mere fact that a mistake is an honest mistake of law, as long as it is not a mistake of public law, which every one is bound to know, has not prevented the Courts from giving relief to one party as against the other—doing justice between the parties. I think the case of *Stone* v. *Godfrey* (1) puts the view that the Courts have taken as well as any case that I have in mind.

In the present case certain annuities and legacies were given "without deduction," and it is obvious that there is an ambiguity, having regard to the position in which we find the authorities, underlying those words. "Without deduction" has been held to mean without any deduction except that of income tax, and those decisions bind me; but it is quite obvious that a layman may very reasonably, in giving what he believes to be effect to the words which the testator has used in this will, come to the conclusion that when he says "without deduction" he means without deduction, and therefore that you cannot deduct income tax. But that is not so. Consequently certain payments have been made for income tax which now turn out to have been improper. They are no doubt in one sense in breach of trust, and the question is whether in making future payments to the same cestuis que trust the trustees are entitled to recoup themselves for the amount they have overpaid.

In dealing with the questions raised by summons under Order LV. I ought to treat them as though the Court were administering the estate in respect of which the questions are raised, and if the Court could make this adjustment between the trustee and the cestui que trust in the case of an administration I ought to direct that that adjustment should be made out of Court, because Order LV. was intended to obviate the expensive necessity of bringing actions for administration where determination is wanted of minor points arising out of the execution of the trust.

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(1) (1854) 5 D. M. & G. 76.

It appears to me that, in accordance with the practice which I understand has always existed, the Court in a proper case—of course there may be cases in which it would be most inequitable to do it—will adjust the rights between the cestui que trust and the trustee who has overpaid through an honest and, so to speak, permissible mistake of construction, or of fact. I think, therefore, that the trustees in the present case are entitled to deduct from future payments the income tax which they have overpaid.

I have been referred to the case of *In re Horne* (1), and it was said that that lays down the general principle that where a mistake has been made by the trustee he cannot get this adjustment against the cestui que trust. I do not think the learned judge put it so high as that. It has nothing to do with the decision of the case before me; clearly it can be supported on other grounds. I do not think that decision is sufficient to alter the practice which in my opinion has existed.

I ought to have said I am supported in the view which I take by the decision of *In re Ainsworth* (2), before Joyce J.

Solicitors: *Bischoff, Coxe, Bompas & Bischoff, for Waugh & Musgraves, Cockermouth; Oldman, Cornwall & Wood Roberts; Morse Hewitt, Farman & Walter; May, How & Chilver; Rawle, Johnstone & Co., for Musgrave & McKelvie, Whitehaven; E. Flux, Leadbitter & Neighbour, for Leadbitter & Harvey, Newcastle-upon-Tyne.*

(1) [1905] 1 Ch. 76.

(2) [1915] 2 Ch. 96.

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Company—Winding up—"Just and equitable"—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 129.

In 1914 W. and R., who traded separately as tobacconists and cigarette manufacturers, agreed to amalgamate their businesses, and in order to do so formed a private limited company in which they were the only shareholders and directors. The constitution of the company was such that under the articles of association W. and R. had equal voting powers, one director was to form a quorum, and if any dispute or difference should arise consequent whereon inability to pass a directors' resolution should result, the matter in dispute should be referred to arbitration, the award to be entered in the minute-book as a resolution duly passed by the board. The company's business was successfully carried on until June, 1915, when differences arose between the parties. One of such differences was referred to arbitration, which, after a protracted hearing involving costs exceeding 1000*l.*, resulted in an award to which R. declined to give effect. He brought an action for fraudulent misrepresentation against W., and the parties became so hostile that neither of them would speak to the other, communications having to be conveyed between them through the secretary of the company. In spite of this the company continued to transact business and large profits were made. Under these circumstances W. presented a petition alleging that a complete deadlock had arisen, that the substratum of the company was gone, and that it was "just and equitable" within s. 129 of the Companies (Consolidation) Act, 1908, that a winding up order should be made:—

Held, affirming the decision of Astbury J., that if this were a case of partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company. The position amounted to a complete deadlock, and it was "just and equitable" that the company should be wound up.

APPEAL from a decision of Astbury J.

In this case a petition was presented by Marcus Weinberg to wind up the above-named company on the ground that it was "just and equitable" that such an order should be made. The company was incorporated in March, 1914, with a nominal capital of 21,285*l.* divided into 20,285 preference shares of 1*l.* each, 500 "A" ordinary shares of 1*l.* each, and 500 "B" ordinary shares of 1*l.* each. The whole of the capital was paid up or credited as paid up. The objects of the company were to acquire, amalgamate, and carry on two businesses formerly separately carried on by the petitioner and Louis Rothman respectively. The company was a private company, the only shareholders being the petitioner and Rothman. It was arranged between the parties that they should have equal rights of management and voting powers in the company. The articles of association were accordingly so drawn that neither party was in a position to outvote the other or to carry any resolution in opposition to the other. The only shares which carried a vote were the " A " shares, and these were allotted equally between the petitioner and Rothman, so that each had the same number of votes in the management of the company. Of the preference shares 16,995 were held by the petitioner and 3290 by Rothman, the whole of the " B " shares being allotted to the petitioner.

It was provided by the articles that the first directors should be the petitioner and Rothman, and each of them should hold office so long as he lived and was the registered holder of his qualification shares; that the directors might meet and regulate their meetings as they thought fit, and that, unless otherwise determined, one should be a quorum; that questions arising at any meeting should be decided by a majority of votes; that in case of an equality the chairman should have a casting vote, provided that there should be no such casting vote during such time as the petitioner and Rothman should both be permanent directors of the company; that if any dispute or difference should arise between the petitioner and Rothman consequent whereon inability to pass a directors' resolution should result, then the matter in dispute should be referred to two arbitrators (one to be appointed by each director) or their umpire, who should communicate their award to the secretary to be entered in the minute-book and deemed to have been duly passed by the board of directors.

The company's business was carried on successfully until June, 1915, when differences arose between the petitioner and Rothman, and in August of that year Rothman brought an action against the petitioner for a declaration that he had been induced to enter into the agreement for the sale of his business to the company by fraudulent misrepresentation and non-disclosure, and asking for rescission or rectification and damages. Since that time the parties had been

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in a state of continuous quarrel. One subject of disagreement related to the employment by the company as factory manager of a man named Litiger whom Rothman had purported to discharge. This matter was referred to arbitration under the articles. After a hearing which lasted eighteen days the umpire made an award confirming Litiger in his appointment at a weekly wage of 5*l.* The costs of the arbitrators and umpire alone amounted to 1050*l.*, of which Rothman was directed to pay two-thirds together with an additional sum of 50*l.* towards the petitioner's costs. Rothman did not pay this sum. Immediately after the publication of the award he arranged for a board meeting of the company after having tried to prevent Litiger from attending at the place of business of the company, notwithstanding the award. Rothman attended the meeting with a resolution written out purporting to dismiss Litiger, and, in the absence of the petitioner, tried to induce the secretary to enter his resolution upon the minutes. The secretary having refused to do so, the petitioner then appeared and further business became impossible. Another quarrel related to the engagement of a traveller and resulted in the company's losing his services. It was alleged that Rothman had threatened to ruin the company, and that he and the petitioner were not now on speaking terms, all communications between them having to be made through a third person at the directors' meetings. Notwithstanding these disagreements it appeared that the company continued to make considerable profits.

Under these circumstances it was contended by the petitioner that a complete deadlock had arisen and that the company ought to be wound up. Astbury J. held that it was not only "just and equitable," but essential in the interests of both parties, that the company should be wound up, and he made an order accordingly.

Rothman appealed.

Hon. F. Russell, K.C., and *A. H. Richardson*, for the appellant. This is not a case of deadlock. The company is able to carry on its business and is prosperous. The disputes that have arisen were trivial and are now at an end. The action brought by Rothman against the petitioner has never proceeded beyond service of the writ. The allegation that Rothman has threatened to ruin the company is denied by him. Hitherto the jurisdiction to make a winding up order as being just and equitable on grounds not ejusdem generis with those mentioned in the first five sub-sections of s. 129 of the Companies (Consolidation) Act, 1908, has not been extended beyond cases of deadlock or where the substratum of the company has gone: *In re Sailing Ship Kentmere Co.* (1); *In re Fromm's Extract Co.* (2); *In re Furriers' Alliance, Ld.* (3); Stiebel on Company Law, p. 798. There can be no deadlock if, as here, the constitution of the company provides a method for the determination of disputes. Since the parties disagreed many directors' meetings have been held at which unanimous resolutions have been recorded. To wind up this company would be going far beyond the cases. It would not be just and equitable at the instance of the larger shareholder to wind up this company and so deprive the appellant of his interest in a profitable business. There is no deadlock and no insuperable difficulty in carrying on the real business of the company.

Gore-Browne, K.C., and *H. S. Henriques*, for the respondent, were not called upon.

LORD COZENS-HARDY M.R. This is an appeal from a decision of Astbury J., who ordered this private company to be compulsorily wound up. I think it right to consider what is the precise position of a private company such as this and in what respects it can be fairly called a partnership in the guise of a private company.

In the present case there were two tobacco manufacturers, one Rothman and the other Weinberg. They were minded to amalgamate their businesses. They formed a private limited company, one certainly of a most peculiar kind. Under the constitution of that company they are the sole shareholders in the company; the only voting power is given to the "A" shareholders, and although the holdings of the two members including "B" shares and preference shares are unequal, one having a larger holding than the other, yet with regard to the only shares which give the power of voting, that

(1) [1897] W. N. 58.
(2) (1901) 17 Times L. R. 302.
(3) (1906) 51 Sol. J. 172.

is the "A" shares, they each hold an equal number and consequently have equal voting rights. The articles of association provide that there shall be no casting vote, that one director shall form a quorum, and that in the event of any particular disagreement between the directors the matter in dispute shall be referred to arbitration; but there is no provision whatever in the articles, and I cannot imagine such a provision, that in the general management of the company all disputes between the directors shall go to arbitration, and certainly, having regard to the result of the one arbitration which has been held, it would be absurd to suggest that the working out of that provision is inexpensive. There was one dispute about a Mr. Litiger which was referred to two arbitrators who could not agree, and then an umpire was appointed, and the result was that the parties were some eighteen days before the arbitrators and umpire, the costs alone of the arbitrators and umpire amounting to upwards of 1000*l.*, to say nothing of the costs of the two parties, each of whom had to pay his own costs.

In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position? I think it is quite clear under the law of partnership, as has been asserted in this Court for many years and is now laid down by the Partnership Act, that that state of things might be a ground for dissolution of the partnership for the reasons which are stated by Lord Lindley in his book on Partnership at p. 657 in the passage which I will read, and which, I think, is quite justified by the authorities to which he refers: "Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

Now here we have this fact. Mr. Rothman has commenced an

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action charging Mr. Weinberg with fraud in obtaining the agreement under which he, Rothman, sold his business to the company. I ask myself the question: When one of the two partners has commenced, and has not discontinued, an action charging his co-partner with fraud in the inception of the partnership, is it likely, is it reasonable, is it common sense, to suppose those two partners can work together in the manner in which they ought to work in the conduct of the partnership business? Can they do so when things have reached such a pass, as they have here, that after an arbitration lasting eighteen days, an arbitration on the only point which was referred, which terminated in favour of Mr. Weinberg, and to which Mr. Rothman declines to give effect, in this sense, that although the award decided that Litiger had not been dismissed and ought to be continued as a servant of the firm until removed, Mr. Rothman will not allow him to come and do his business, so that he, Litiger, is in the happy position now of receiving his wages of 5*l.* a week without being allowed to do any work for the company in respect of which he is a servant?

The matter does not stop there. It is proved that these two directors are not on speaking terms, that the so-called meetings of the board of directors have been almost a farce or comedy, the directors will not speak to each other on the board, and some third person has to convey communications between them which ought to go directly from one to the other.

Is it possible to say that it is not just and equitable that that state of things should not be allowed to continue, and that the Court should not intervene and say this is not what the parties contemplated by the arrangement into which they entered? They assumed, and it is the foundation of the whole of the agreement that was made, that the two would act as reasonable men with reasonable courtesy and reasonable conduct in every way towards each other, and arbitration was only to be resorted to with regard to some particular dispute between the directors which could not be determined in any other way. Certainly, having regard to the fact that the only two directors will not speak to each other, and no business which deserves the name of business in the affairs of the company can be carried on, I think the company should not be allowed to continue. I have treated it as a partnership, and

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under the Partnership Act of course the application for a dissolution would take the form of an action; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company? It is a private company, and there is no way to put an end to the state of things which now exists except by means of a compulsory order. It has been urged upon us that, although it is admitted that the "just and equitable" clause is not to be limited to cases ejusdem generis, it has nevertheless been held, according to the authorities, not to apply except where the substratum of the company has gone or where there is a complete deadlock. Those are the two instances which are given, but I should be very sorry, so far as my individual opinion goes, to hold that they are strictly the limits of the "just and equitable" clause as found in the Companies Act. I think that in a case like this we are bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company.

Astbury J. dealt with this case, as it seems to me, in a most satisfactory way, and at the end of his judgment he says that he tried to suggest a solution: he suggested that the two should continue or try to continue for six months to see if they could get on better or that they should appoint one or more additional directors to assist them in the business; but this neither would do. If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible. We are told that we ought not to do it because the company is prosperous, making large profits, rather larger profits than before the disputes became so acute. I think one's knowledge of what one sees in the streets is sufficient to account for that, having regard to the number of cigarettes that are sold, and we can take judicial notice of that in judging whether the business is much larger than it was before. Whether such profits would be made in circumstances like this or not, it does not seem to me to remove the difficulty which exists. It is contrary to the good faith and essence of the agreement between the parties that the state of things which we find here should be allowed to continue.

In my opinion the appeal fails and ought to be dismissed with costs.

PICKFORD L.J. I agree and have nothing to add.

WARRINGTON L.J. Prior to March, 1914, two persons, one named Rothman and the other named Weinberg, were carrying on independent businesses as cigar and cigarette merchants and tobacconists. They determined that for the future they would carry on those two businesses together, and for the purpose of carrying into effect that determination they caused to be incorporated a private company which was registered in the month of March, 1914. Under the constitution of the company each of these two gentlemen had equal voting powers as members of the company. Each of them was appointed a director. They were the only directors. The articles contained a provision intended to meet the difficulty that might arise if these two gentlemen were unable to pass a resolution of directors. That article is in these terms: "If any dispute or difference shall arise between the said Marcus Weinberg and Louis Rothman whilst both holding the position of permanent directors consequent whereon inability to pass a directors' resolution will result, then and in any such case the matter in dispute shall be referred to the final arbitrament of two arbitrators or their umpire," and the arbitrators or their umpire were to communicate the award to the secretary, and it was to be entered in the minute-book and was to be equivalent to a resolution of the directors.

In the middle of the year 1915 there did arise a dispute or difference between these two gentlemen with reference to a certain specific matter connected with the business of the company, namely, whether Mr. Litiger, their factory manager, should continue in office or not. Rothman desired his dismissal, Weinberg desired his continuance in his present employment. That was referred to two arbitrators and their umpire. It cost the partners more than 1000*l.* in arbitrators' fees alone, without counting the expenses to

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which the two partners were themselves put in connection with the arbitration. It resulted in an award, the principal effect of which was that Litiger was still the factory manager notwithstanding his affected dismissal by Rothman. Rothman, it is not too much to say, refused to accept that award and attempted to act as if it had not been made. Another serious question has arisen which has not been the subject of arbitration. The dispute was as to the terms upon which a certain traveller should be engaged whose agreement had come to an end, and he solved the question by taking employment with somebody else. In addition to those two specific matters of dispute it appears that neither of these two directors will speak to the other. If any business has to be transacted by the company, some third person has to be present to whom each of these directors can express his views. They are not on speaking terms, to put it shortly.

Under those circumstances Weinberg applies to the Court for an order to wind up the company. Rothman opposes it. The company does not appear as such because there are no means by which instructions can be given to anybody to appear on its own behalf. In substance, therefore, it seems to me these two people are really partners. It is true they are carrying on the business by means of the machinery of a limited company, but in substance they are partners; the litigation in substance is an action for dissolution of the partnership, and I think we should be unduly bound by matters of form if we treated either the relations between them as other than that of partners or the litigation as other than an action brought by one for the dissolution of the partnership against the other; but one result which of course follows from the fact that there is this entity called a company is that, in order to obtain what is equivalent to a dissolution of the partnership, the machinery for winding up has to be resorted to. Now, if this had been an ordinary partnership and an action had been brought for dissolution, it seems to me quite clear that the plaintiff, who is the petitioner in this case, would have had sufficient ground for a dissolution of partnership according to the ordinary principle by which the Court is guided in such matters. Then s. 129 of the Companies (Consolidation) Act, 1908, which defines the grounds upon which the Court in the case of a company can make an order for winding up, includes the provision that such an order may be made if the Court is of opinion that it is just and equitable that the company should be wound up. At one time it was thought, and there was judicial opinion in support of it, that in order to bring the case within that provision of the Companies Act it must be shown to be ejusdem generis with a certain number of other cases which are specified in a previous part of the section; but that opinion has long been abandoned, and the Court has in more cases than one expressed the view that a company may be wound up if, for example, the state of things is such that what may be called a deadlock has been arrived at in the management of the business of the company. I am prepared to say that in a case like the present, where there are only two persons interested, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other. Such ground exists in the present case. I think, therefore, that it is just and equitable that the company should be wound up.

There is only one other point to which I ought to refer. It is said that according to the constitution of the company there is provided a means by which the quarrels of these directors can be overridden for the benefit and advantage of the company and the deadlock can be got rid of, and the means suggested is the provision in article 106 for reference to arbitration; but, in my judgment, that article does not contemplate a case such as the present, where, in the daily intercourse between the two directors, they are unwilling to speak to each other and discuss the affairs of the company. It relates, I think, to specific cases where a particular resolution important to the company cannot be passed because of a dispute or difference between the two directors, and it is therefore necessary to obtain the authority of some third person who will say what is to be done. It seems to me it has no reference to the ordinary everyday business of the company and its conduct, and that it really does not provide the means of getting rid of the difficulties which are encountered in the present case.

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For these reasons I think the order made by Astbury J. is quite right and the company must be wound up.

Solicitors for appellant: *G. & W. Webb.*
Solicitor for respondent: *Arthur S. Joseph.*

G. A. S.

SARGANT J.
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May 24, 31.

GEORGE HOLLOWAY & WEBB, LIMITED *v.* CROMPTON.

[1914 H. 329.]

Practice — Costs — Apportionment — Chancery Division — Rules of the Supreme Court, 1883, *Order* LXV., *r.* 2.

The addition made in 1902 to Order LXV., r. 2, of the Rules of the Supreme Court, 1883, made an alteration in the practice of the Chancery Division, and is a rule of construction of orders in the form referred to in the first part of the added words. Where, therefore, an order is made giving a plaintiff part of the relief asked for and ordering taxation of his costs of the action, except so far as it relates to specified claims on which he has failed, and ordering taxation of the defendant's costs of those claims, with a direction as to set-off, the plaintiff is entitled to the general costs of the action and the defendant is not entitled to have them apportioned.

Todd v. *North Eastern Ry. Co.* (1903) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112, distinguished.

THIS action was brought for (1.) a declaration that the defendant was liable to pay the amount of certain profits; (2.) an account of the same; (3.) an injunction to restrain the defendant from holding himself out as the successor of the plaintiffs in a certain department of their business; (4.) an injunction to restrain the defendant from intercepting certain letters and other communications; (5.) delivery up on oath of certain documents referred to in paragraph 8 of the statement of claim; (6.) an injunction to restrain the defendant from making use of those documents; (7.) damages for the detention of the same documents; (8.) payment of a sum said to be due for goods sold; (9.) an account of all moneys received by the defendant on account of the plaintiffs; (10.) payment of the amount found due on taking the account; (11.) payment of 12*l.* 14*s.* paid by the plaintiffs on the defendant's behalf.

The defendant counterclaimed for (1.), (3.), an injunction to restrain the plaintiffs from representing that he was not their successor, and damages in respect of those representations; (2.) damages for alleged injury by the removal of stock; (4.) certain commission; (5.) damages for closing down a certain hire business; (6.) a sum alleged to be due for salary.

On October 12, 1915, Sargant J. (without hearing the merits) gave judgment, in accordance with minutes agreed on by the parties, (1.) for recovery by the plaintiffs of 640*l.* 9*s.* 9*d.*; (2.) granting a perpetual injunction to restrain the defendant from holding himself out as such successor as aforesaid; and (3.) granting a perpetual injunction against the interception of the letters, &c. The rest of the judgment was as follows: "And it is ordered that it be referred to the taxing Master to tax the costs of the plaintiffs of this action and counter-claim, except so much thereof as relates to the claims in respect of the books, files, papers, and documents in paragraph 8 of the statement of claim mentioned, and to the claim for the sum of 12*l.* 14*s.* in paragraph 11 of the statement of claim mentioned; and to tax the costs of the defendant in respect of the said excepted claims. And the taxing Master is to set off the costs of the plaintiffs and defendant respectively and to certify to which of them the balance, after such set-off, is due. And it is ordered that such balance be paid by the party from whom to the party to whom the same shall be certified to be due."

The plaintiffs and defendant having sent in their bills of costs for taxation, the taxing Master gave the plaintiffs the whole of the general costs of the action. The defendant carried in objections to the taxation on the following grounds: "(1.) Because the principle adopted by the Master on this taxation is wrong in giving to the plaintiffs all the general costs of the action; (2.) because, under an order in the form of the order in this action, the general costs of the action are under the settled practice of the Chancery Division . . . . always apportioned; (3.) because there is a well-settled form of order (being the form of order set out on p. 236 of Seton on Judgments, 7th ed., being Form 10 thereon), which is always used in the Chancery Division when it is intended that one of the parties to the action is to be allowed all the general costs of the action, and the order in this action is not in this form." The taxing Master, however, refused to apportion the general costs of the action (all of which he gave to the plaintiffs), relying on Rules of the Supreme Court, Order LXV., r. 2, and particularly on the first part of the second sentence in that rule, and certified that he had taxed the plaintiffs' costs at 162*l.* 12*s.* 4*d.* and defendant's at 8*l.* 7*s.* 7*d.*, and that on the set-off there was a balance of 154*l.* 4*s.* 9*d.* due to the plaintiffs.

The rule (as amended by the Rules of the Supreme Court, January, 1902, and July, 1902) is as follows: "When issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event. And an order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the Court or judge, if the whole costs of the action or other proceedings are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the Court or judge shall determine."

The defendant thereupon applied by summons that his objections to the taxation might be allowed, and that it should be referred back to the taxing Master to vary his certificate accordingly.

The summons was adjourned into Court and heard on May 24, 1916.

In the course of the argument a note by one of the taxing Masters was read in which, after stating that it had been suggested that *Todd* v. *North Eastern Ry. Co.* (1) compelled apportionment, the Master said: "It seems, however, doubtful whether this is so. Two years after that case a similar question came before the same judge (Farwell J.) in the case of *Hughes* v. *Whitecross Co.* (2) There the direction was 'To tax the costs of the plaintiffs of this action except so much thereof as relates to [a certain claim] and to tax the costs of the defendants of so much of this action as relates to [the said claim]. The Master in this case declined to apportion the general costs.' . . . . The proceedings on review confirm this construction of the order as drawn up, but, as the Court was of opinion that the order as drawn up intended and directed that there should be an apportionment, the order was directed to be amended under Order XXVIII., r. 11, in the following form : 'To tax the costs of the plaintiff of so much of this action as relates to [a claim on which the plaintiff succeeded] and to tax the costs of the defendants of so much of the said action as relates to [the claims on which the defendants succeeded].' It may, accordingly, be safely concluded that it is this form, and not the form of order as originally drawn up, which carries the apportionment of costs."

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(1) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112.

(2) Unreported.

Bovill, for the defendant. The general costs of the action are apportionable. The alteration made in January, 1902, in Order LXV., r. 2, did not alter the then existing settled practice of the Chancery Division : *Todd* v. *North Eastern Ry. Co.* (1) There it was held that the practice of the Chancery Division remained as it had previously been laid down in *Jenkins* v. *Jackson* (2), namely, that under an order like this the costs are to be apportioned. That is the view taken in the Annual Practice, 1916, p. 1249. Where the general costs are not to be apportioned the order is as in Seton on Judgments, 7th ed. p. 236, Form 10.

The old and still existing rule is laid down in Seton on Decrees, 4th ed. p. 129, as follows : "When the Court gives part of the costs of the suit it may do so in two ways ; the one will involve an apportionment of the whole of the general charges ; the other will extend only to the excess of expense incurred in consequence of the particular matter directed to be excepted. . . . . In the former case, where the Court directs taxation of the costs of one of several objects of the suit, that carries not only so much of the costs of the suit as relates exclusively to that particular object, but also a portion of the costs of every general proceeding in the suit." The forms of order referred to, involving an apportionment of the general costs, are given in Seton on Decrees, 4th ed. pp. 117, 118, Forms 16 and 17. Where the order is in Form 18 there is no apportionment. In Seton on Judgments, 7th ed. (which was published in 1912) p. 250, the rule as laid down in Seton on Decrees is repeated, and it is stated that that is the settled practice of the Chancery Division. [He also

(1) 51 W. R. 333 ; 87 L. T. 710 ; 88 L. T. 112.

(2) [1891] 1 Ch. 89.

referred to Seton on Judgments, 7th ed. pp. 235, 236; *Knight* v. *Purssell* (1); *Harley* v. *Hunt.* (2)]

Tyldesley Jones, for the plaintiffs. The taxing Master's decision is right. The amending part of Order LXV., r. 2, altered the practice as to apportionment. The amendment is in two parts. One says that the exception is to exclude only the costs of the particular issues mentioned; that is to say, that the general costs are not affected. The second part provides that the Court may order an apportionment of costs. It was the earlier part of the amendment which altered the practice. *Todd* v. *North Eastern Ry. Co.* (3) is not an authority in point, for in that case the order was not in a form which brought the case within the first part of the amendment. The notes in Seton on Judgments, 7th ed. pp. 235, 250, which are taken from previous editions of that work issued before the rule was amended, are incorrect. The order here is exactly the form of order contemplated by the earlier part of the amendment, which is a rule as to the construction of such orders.

Bovill in reply.

Cur. adv. vult.

May 31. SARGANT J. In this action an agreed judgment was taken under which a perpetual injunction was granted against the defendant, and the following order was made as to costs: "That it be referred to the taxing Master to tax the costs of the plaintiffs of this action and counter-claim except so much thereof as relates to the claims in respect of the books, files, papers, and documents in paragraph 8 of the statement of claim mentioned and to the claim for the sum of 12*l.* 14*s.* in paragraph 11 of the statement of claim mentioned, and to tax the costs of the defendant in respect of the said excepted claims, and the taxing Master is to set off the costs of the plaintiffs and defendant respectively and to certify to which of them the balance after such set-off is due."

In taxing under this order the taxing Master has refused to apportion the general costs of the action and has given the whole of these costs to the plaintiffs, and he has justified this refusal by a reference to the terms of Order LXV., r. 2, and particularly to the first part of the second sentence in that rule. The question for me is whether the taxing Master was right in his view.

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(1) [1879] W. N. 182; 49 L. J. (Ch.) 120.

(2) [1887] W. N. 184.

(3) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112.

Until the year 1902 r. 2 of Order LXV. consisted only of what is now the first sentence of that rule; and while that was the case the practice of this Court was well settled, and there could, I think, have been no doubt as to the effect of an order in the present form. If a party was not ordered to pay or was given the costs of a particular issue he was relieved of or given, as the case might be, not only the costs of that particular issue, but also an apportioned part of the general costs of the action. To limit the costs of the issue merely to such extra or increased costs as had been occasioned by the addition of the issue it was necessary to use words expressing that it was the increased costs only which were being excluded or given. This is quite clearly stated in the 4th edition of Seton on Decrees, vol. i. pp. 129 and 130, and in the 5th edition of the same work, vol. i. pp. 226 and 227, and is undoubtedly the result of such cases as *Knight* v. *Purssell* (1), *Jenkins* v. *Jackson* (2), and *Harley* v. *Hunt.* (3)

But then came the addition made in January, 1902, which is in the following terms: "And an order giving a party costs except so far as they have been occasioned or incurred by or relate to some particular issue or part of his proceedings shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings, but the Court or judge, if the whole costs of the action are not intended to be given to the party, may, wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the Court or judge shall determine." This addition plainly consists of two parts operating in entirely different ways. By the first part a rule of construction is applied to orders couched in one or other of three alternative forms; by the second part a discretion is given to the Court to award in suitable cases a proportion of the whole costs of the action in lieu of awarding the costs of a particular part of the action.

Now here it is hardly disputed that so much of the order as deals with the costs to be taxed in favour of the plaintiffs is couched in the third of the three alternative forms mentioned in the first part of the addition to r. 8. Accordingly I am bound on the plain terms of this part of the addition to read and construe this part of the order as excluding from the costs of the action to be taxed in favour of the plaintiffs that amount only by which the costs have been increased by the particular claims in question. And this being so, the correlative part of the order as to the costs to be taxed in favour of the defendant must necessarily be read as relating in its turn only to the increased costs occasioned by the same claims.

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(1) 28 W. R. 90; 49 L. J. (Ch.) 120.

(2) [1891] 1 Ch. 89.

(3) [1887] W. N. 184.

The net result, therefore, is that owing to the statutory construction introduced by the first part of the addition to the rule the order of October 12, 1915, becomes one under which the plaintiffs are entitled to the whole of the general costs of the action without any apportionment. This is the view which has been adopted by the taxing Master.

But it has been objected by Mr. Bovill that the contrary was decided by Farwell J. and the Court of Appeal in a case of *Todd* v. *North Eastern Ry. Co.* (1); and certainly this case is referred to in the Annual Practice, 1916, pp. 1240 and 1249, in a manner likely to give rise to this impression. When, however, that case is carefully examined, it is clear that the order there had not been couched in terms which brought it within the rule of construction embodied in the first part of the addition to r. 2, and that both the argument and the decision turned entirely on the latter part of that addition, namely, the sentence beginning with the words "but the Court or judge." This indeed explains the ease with which the Court of Appeal dismissed the appeal there as being a very plain case. And a good deal of significance attaches in this connection to what was done some two years afterwards by Farwell J. himself in a case of *Hughes* v. *Whitecross Co.* (2), of which a note has been furnished to me by the taxing Master. In that case an order had been made which was in essentials in the same form as the order here, and the taxing Master had refused to apportion the costs for reasons which were rather more elaborately stated than those given by the taxing Master in this case and are practically identical with the view I have expressed above. On the matter coming before Farwell J. he took the view that the judgment as pronounced by him was intended to provide for an apportionment of the costs, and he directed that the order as drawn up should be amended under the slip rule (Order XXVIII., r. 11) so as to run in a form similar to that in *Todd* v. *North Eastern Ry. Co.* (1) This, though not actually a decision, is at least some recognition of a marked difference between the results of an order in the form in *Todd* v. *North Eastern Ry. Co.* (1) and an order in the form in the present case.

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(1) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112.

(2) Unreported.

In the absence, therefore, of any authority against the view already expressed, I must act on what seems to me the plain effect of the order in this case as construed or interpreted in the light of the first part of the addition to r. 2, and accordingly I dismiss this summons with costs.

Solicitor for defendant: *James C. Fox.*

Solicitors for plaintiffs: *Vizard, Oldham, Crowder & Cash, for Humfrys & Symonds, Hereford.*

(1) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112.

F. E.

Applied. Re SHEPHERD. [1949] 1 Ch. 116

SARGANT J.

1916

June 21.

In re STODDART.

BIRD *v.* GRAINGER.

[1916 S. 632.]

Considered. In re HOWELL, DECD. [1952] 1 Ch. 264

Will—Construction—Settled Legacies—Legacies to "be paid and enjoyed free of all death duties"—Estate Duty—Duty now payable on Death of Tenant for Life of Settled Legacy—Finance Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14.

A testator who died in 1913 gave six sums varying from 7000*l.* to 1000*l.* to trustees upon trust as to each sum to pay the income to a relation for life, and then to his or her wife or husband for life, and subject thereto he gave the income and capital to the children and issue of the relation. The will also said: "I direct all the legacies (whether settled or otherwise) and the annuities hereinbefore bequeathed to be paid and enjoyed free of all death duties." The real and personal estate was given to the trustees upon trust for sale and conversion and out of the proceeds "to pay my funeral and testamentary expenses and debts and pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon" and to invest the residue in trust for certain charities. Sect. 14 of the Finance Act, 1914, abolished the relief which had been given by s. 5, sub-s. 2, of the Finance Act, 1894, in respect of the estate duty which would otherwise have been payable on the deaths of the tenants for life of the settled legacies, and consequently created a further claim for estate duty on those legacies:—

Held, that the words of the will threw that prospective claim on the residue in relief of the settled legacies.

In re Palmer, now reported ante, p. 391, followed.

Observations on *In re Snape* [1915] 2 Ch. 179.

SIR CHARLES JAMES STODDART, by his will dated February 13, 1913, (by clause 1) appointed W. B. M. Bird executor and trustee, and (by clause 3) gave pecuniary legacies, ranging in amount from 25*l.* to 1500*l.*, to various relatives, servants, and others, and (by clause 4) bequeathed two annuities. By clause 5 the testator bequeathed to his trustees six several sums of 7000*l.*, 4000*l.*, 1000*l.*, 1000*l.*, 1500*l.*, and 1000*l.* respectively upon trust to invest the same sums as thereinafter authorized, directing that until investment each sum was to carry interest at 4 per cent. from testator's death, payable out of his residuary estate, and that his trustee should stand possessed of such sums and the investments and income thereof upon the trusts thereinafter declared and contained of and concerning the same respectively, namely, (*a*) as to the 7000*l.* upon trust in favour of his brother Alfred G. Stoddart and his wife for their respective lives, and subject thereto upon trust for the children and issue of A. G. Stoddart, and "(*b*) as to the said sum of 4000*l.*, or the investments representing the same, upon trust to pay the income thereof to my sister, Charlotte Grainger, during her life for her separate use, without power of anticipation, and after her death to pay the income of a moiety thereof to her husband, Harry Grainger, if surviving, during the remainder of his life, and subject thereto, as to as well capital as income, upon the like trusts in favour of the children and issue of my said sister Charlotte as are hereinbefore declared of and concerning my brother Alfred's legacy in favour of his children and issue." By the rest of clause 5 the remaining sums of 1000*l.*, 1000*l.*, 1500*l.*, and 1000*l.* were respectively settled upon trusts in favour of four other persons and their children and issue. By clause 6 the testator gave seven pecuniary charitable legacies. Clause 7 of the will was as follows: "I direct all the legacies (whether settled or otherwise) and the annuities hereinbefore bequeathed to be paid and enjoyed free of all death duties." By clause 8 testator devised all his real and personal property not by his will or any codicil thereto specifically disposed of to his trustee upon trust for sale and conversion and out of the proceeds "to pay my funeral and testamentary expenses and debts and pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon," and to invest the residue of the moneys and stand possessed of the investments and the income thereof in trust for such charitable institution or institutions or other charitable object or objects for the benefit of the inhabitants of the borough of Rotherham as his trustee should select, with a suggestion that the residuary fund should be applied so as to perpetuate testator's memory in his native town of Rotherham, as, e.g., by erecting and endowing almshouses and providing certain doles.

The testator died on May 24, 1913, without having revoked or altered his will, which was proved on July 9, 1913. The six legacies referred to in clause 6 of the will were all set aside and invested in the names of W. B. M. Bird and another person.

W. B. M. Bird, as sole executor and trustee, took out an originating summons against Charles Joseph Grainger, who was a child of

Charlotte Grainger, and the Attorney-General for the determination of the question whether the estate duty imposed by s. 14 of the Finance Act, 1914 (4 & 5 Geo. 5, c. 10), in respect of the six settled legacies was to be borne by the corpus of the settled legacies respectively, or whether the duty was payable out of the residuary estate, and asking that he might be appointed to represent, for the purposes of the summons, all persons interested in the settled legacies.

C. G. Church, for the plaintiff, stated the facts and the question for decision, and referred to *In re Hatch* (1), *In re Snape* (2), and *In re Palmer*. (3)

A. Grant, K.C., and *Daynes*, for the defendant Grainger. In *In re Palmer* (3) in the Court of Appeal it was argued that *In re Snape* (2) laid down a general rule, but the Court held that the language of each particular will must be regarded. *In re Snape* (2), *In re Palmer* (3), and *In re Hatch* (1) were all differently decided, and the will in the present case is most like that in *In re Hatch*. (1) The estate duty should be held to be thrown on the residue. [They referred to the shorthand note of the judgments in the Court of Appeal in *In re Palmer*. (3)]

Austen-Cartmell, for the Attorney-General. First, I say that the general principle is that where a testator is referring to duties payable on death he refers to those payable on his own death as the causa causans. Secondly, on the words of this particular will, and according to *In re Snape* (2), the testator contemplated the payment out of the residue of duties payable on his own death only. The times for payment of the duty may vary, but the liability is irrevocably fixed at the time of the testator's death. It would be unfairly mulcting the residuary legatees to throw these duties on them. [He referred to the Finance Act, 1914, s. 14, and the Finance Act, 1894 (57 & 58 Vict. c. 30), ss. 1, 4; s. 8, sub-s. 4; s. 9, sub-s. 1; and s. 21, sub-s. 1.]

SARGANT J. This summons raises the same question that has been dealt with by Eve J. in *In re Snape* (2), by the Court of Appeal in *In re Palmer* (3), and by myself in *In re Hatch* (1), and is whether the new estate duty imposed by s. 14 of the Finance Act, 1914, in respect of certain settled legacies will have to be borne by the corpus of those settled legacies or will be payable out of the residuary estate of the testator.

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(1) [1916] W. N. 240.

(2) [1915] 2 Ch. 179.

(3) [1916] 1 Ch. 395; on appeal [1916] W. N. 229. (Now reported ante, p. 391.)

The testator, Sir Charles Stoddart, who was a gentleman of considerable means and died worth something between 55,000*l.* and 60,000*l.*, after giving certain comparatively small pecuniary legacies, bequeathed six legacies which were settled on members of his family and their descendants. I will take as an example —because that is the legacy with regard to which the defendant C. J. Grainger is concerned—the legacy of 4000*l.* dealt with by clause 5 (*b*) of the will [which his Lordship read]. After giving those six legacies the testator gave a large number of charitable legacies; and he gave the residue of his estate for a charitable purpose, and accordingly the Attorney-General represents the residue. [His Lordship read clause 8 of the will, ending "pay my funeral and testamentary expenses and debts and pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon," and also clause 7 of the will, and continued :] It is quite clear from the use of the words "pay or provide for" in clause 8 of the will that the testator is contemplating the relief of the settled legacies from some duties which have not to be paid immediately on his death. It is equally clear—and I do not think that Mr. Austen-Cartmell disputed this—that amongst those duties which have to be provided for are the legacy duties which will become payable on the various settled legacies as the interests in those legacies, which are now in remainder, fall from time to time into possession.

The question I have to decide is whether—in view of the abolition by s. 14 of the Finance Act, 1914, of the relief from estate duty which had been given by s. 5, sub-s. 2, of the Finance Act, 1894, in respect of the estate duty which would otherwise have been payable on the settled legacies on the deaths of the persons entitled for life to the income thereof, and in view of the consequent creation of a future claim for estate duty on those legacies —clause 7 of the will throws that prospective claim for the duty on to the residue in relief of the settled legacies.

In *In re Snape* (1) Eve J. decided —and his decision was a most convenient one—that, prima facie, a claim of this kind must be construed, even with regard to the enlargement of its operation, so as to be limited to duties which should be in existence, at the latest, at the testator's death. And he said that, as a matter of construction, the Court should construe the will, in this respect, as at the date when it was made, but that, although it was construed as at that date, its application might be enlarged by what happened afterwards, provided that that enlargement did not go beyond the testator's death. But that general principle has—as appears from the shorthand note of the decision of the Court of Appeal in *In re Palmer* (1), which has been read to me—been disapproved of by the Court of Appeal, which has said that you must regard the language of each particular will.

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(1) [1915] 2 Ch. 179.

I must say that I feel a great difficulty about accepting the intermediate date—namely, the date of the testator's death—selected by Eve J. in *In re Snape.* (2) It seems to me that, as a matter of construction, the Court has first to consider the document as at the date when it was made, and then to consider whether subsequent circumstances have enlarged its application, and that there is no particular reason or virtue in limiting the date within which those circumstances must be considered to the date of the testator's death. What is to be considered is how far the application has been enlarged at the time when the application has to be considered. Here the language of the testator in clause 7 of his will is extraordinarily wide and general. Mr. Austen-Cartmell has asked me to read it as meaning that the legacies referred to in it are to be free of all duties arising in consequence only of the testator's death. So to read the clause would be unduly limiting its clear words. It will be sufficient for the pecuniary legatees if the words "free of all death duties" are limited so as to mean "free of all duties arising by virtue of the dispositions made by my will"; and I see no reason for limiting them, if I limit them at all, to any greater extent.

No doubt great practical difficulties arise from this result, which is that some part of the residue must be kept to answer any fresh duties which may be imposed by the Legislature. But that might be so even on the construction contended for by Mr. Austen-

(1) [1916] W. N. 229. (Now reported ante, p. 391.)

(2) [1915] 2 Ch. 179.

Cartmell; for if the Legislature were to increase the rate of legacy duty payable by these legatees in remainder—which is not impossible—that rate of legacy duty would, on that construction, have to be provided for out of the residue. Here, although the estate duty now in question is one that arises, not on the death of the testator, but on the death of a tenant for life, and is estimated qua the rate chargeable, not with reference to the property of the testator at all, but with reference to the amount of the property of the tenant for life, still there is undoubtedly a death duty which arises by virtue of the dispositions made by the testator, although it only arises by virtue of those dispositions when coupled with some subsequent legislation.

I cannot help feeling deeply impressed by this, that, if the testator had desired that the pecuniary legacies settled on his relations should be enjoyed by them absolutely and entirely net, it would be very difficult for him to have used any more comprehensive words than those which are to found in his will. It seems to me that that was his desire—that, while giving his residue to charity and measuring out carefully the amounts which were to go to his relations, he did by this clause intend to provide that those relations should take the amounts provided for them absolutely and entirely net and free from death duties of all descriptions.

That being my view of the construction of this particular will, it follows, on the principle laid down by the Court of Appeal in *In re Palmer* (1), that I ought to hold that this particular estate duty, although it was imposed after the death of the testator, and (though I do not see the relevance of that date) after the year within which the testator's estate normally would be administered, is within the very wide language of this will.

Solicitors for plaintiff and defendant Grainger: *Bird & Bird.*
Solicitor for the Attorney-General: *The Treasury Solicitor.*

(1) [1916] W. N. 229. (Now reported ante, p. 391.)

F. E.

ASTBURY J.

1916.

July 25.

In re MACKENZIE & CO., LIMITED.

[0065 of 1916.]

Company—Reduction of Capital—Preference Shares—Holders' Rights fixed by Memorandum and Articles—No Priority as to Capital—No Voting Power—Fixed Preferential Dividend on Amount paid up—Modification of Rights Clause—Rights unalterable without requisite Consent—Rateable Reduction—Consent unnecessary—Right to be summoned to Meetings.

Where there is more than one class of shares in a company a petition for reduction of capital ought to state whether or not there is any priority as to capital.

Where under the memorandum and articles preference shareholders have no priority as to capital and no voting power but are merely entitled to a fixed cumulative preferential dividend on the nominal amount of the capital from time to time paid up on their shares, and the company has power to reduce capital, a rateable reduction on all the shares, preference and ordinary, though diminishing the actual preferential dividend, is not an alteration of the rights of the preference shareholders so as to require their sanction under an ordinary modification of rights clause.

In re Welsbach Incandescent Gas Light Co. [1904] 1 Ch. 87 distinguished.

Semble. Apart from some special provision in the articles preference shareholders with no right of voting are not entitled to be summoned to general meetings.

PETITION.

The above company was incorporated on October 2, 1900, to carry on the business of wine and spirit merchants. The capital was 200,000*l.* divided into 10,000 shares of 20*l.* each, of which 6000 were 4 per cent. cumulative preference shares and 4000 were ordinary shares. The issued capital was 5300 preference and 1578 ordinary shares, all fully paid. This left 700 preference and 2422 ordinary shares unissued.

The memorandum provided as follows :—

Clause 5. " The capital of the company is 200,000*l.* divided into 10,000 shares of 20*l.* each, whereof 6000 are 4*l.* per cent. preference shares and 4000 are ordinary shares, with the respective rights and privileges specified in the articles of association registered herewith."

Clause 6. "Subject to any express provision to the contrary made upon the creation of any class of shares, all or any of the special rights, privileges and advantages attached to any class may, with the sanction in writing of the holders of two-thirds of the issued shares of the class (but shall not without such sanction), be altered, modified, dealt with or affected in any manner whatsoever. . . . ."

The articles provided as follows :—

Article 59. "The company may by special resolution so far modify the conditions contained in its memorandum of association as to do the following things or any of them :— . . . .

"(*c*) Reduce its capital in any manner and with any incident authorized by the statutes. . . . ."

Article 62. "The shares in the original capital of the company numbered 1 to 6000, both inclusive, shall be called 4*l.* per cent. cumulative preference shares, and the holders thereof shall be entitled to receive out of the profits of the company available for division among the members dividends at the rate of 4*l.* per cent. per annum on the nominal amount of the capital from time to time paid up or credited as paid up on the 4*l.* per cent. cumulative preference shares held by them respectively, such dividend to be cumulative and to be payable half-yearly on January 1 and July 1 in each year, and to be a first charge on such profits upon a winding-up of the company."

Article 64. "All or any of the special rights, privileges and advantages attached to any class of shares may, with the sanction in writing of the holders of two-thirds of the issued shares of the class, but shall not without such sanction, be altered or modified, dealt with, or affected, in any manner whatsoever."

Article 68. "Twenty-one days' notice at the least (exclusive of the day on which the notice is served, or deemed to be served, but inclusive of the day for which the notice is given), specifying the place, the day, and the hour of meeting, and in case of special business the general nature of such business, shall be given, in manner hereinafter mentioned, to such members as are, under the provisions hereinafter contained, entitled to receive notices from the company ; but the accidental omission to give such notice to, or the non-receipt of such notice by, any member shall not invalidate any resolution passed or proceeding had at any such meeting."

Article 79. "On a show of hands every member personally present and who shall be the holder of an ordinary share or ordinary shares shall have one vote, and every proxy or attorney for an absent member holding ordinary shares shall (in addition to his vote, if any, as a member) have a vote for each absent member for whom he shall to the satisfaction of the chairman prove that he is a proxy. In case of a poll, every member who is the holder of ordinary shares shall have one vote for every ordinary share. The holders of the preference shares . . . . shall not be entitled to vote unless the company make default for six calendar months in payment of the preference dividend at the rate of 4*l.* per cent. per annum. Holders of preference shares . . . . if entitled to vote at general meetings, shall have one vote for every five preference shares held by them. . . . ."

Article 129. "A notice may be served by the company or the directors upon any member either personally or by sending it through the post in a prepaid letter addressed to such member at his registered address as appearing in the register of members."

Article 131. "Any member described in the register of members by an address not within the United Kingdom, who shall from time to time by himself or his duly authorized attorney give the company an address within the United Kingdom at which notices may be served upon him, shall be entitled to have notices served upon him at such address, but save as aforesaid no member other than a registered member described on the register of members by an address within the United Kingdom shall be entitled to receive any notice from the company."

By special resolutions of July 28 and August 26, 1908, the company was declared a private company, the number of members being limited to fifty, and any invitation for public subscription precluded.

The preference dividend had been regularly paid, but no dividend had been paid on the ordinary shares since 1912, and on a valuation of the assets in 1915 it was found that the company had suffered a loss of 34,390*l.*, which was equivalent to 5*l.* a share on the issued capital. This amount was made up of 27,663*l.* loss on sale of a large stock of wine, 1400*l.* written off German and Austrian book debts presently unrealizable, 4327*l.* depreciation of investments, and an allowance of 1000*l.* for expenses of a proposed reconstruction. The investments were valued at the legal minimum price, which was of course above their real value.

A scheme was prepared under which it was proposed to reduce every share by 5*l.*, and as owing to the depressed state of the wine trade the capital would then be more than 20,634*l.* in excess of the wants of the company, it was also proposed to return 3*l.* a share to every shareholder in further reduction of capital.

On September, 15, 1915, a copy of the scheme was sent to every shareholder together with a circular letter from the board pointing out that, as the present capital was not represented by available assets, it was necessary to write off 5*l.* per share on both classes of shares, and it was proposed to pay each shareholder a sum of 3*l.* per share, and adding that in order that the scheme could be carried out an extraordinary general meeting for the purpose of passing the necessary resolutions for reducing the capital, and returning the 3*l.* per share, as set out in the scheme would, as appeared from the accompanying notice, be held at the registered office on October 8, 1915. [This notice of the first meeting showed that it was also proposed to cancel the unissued shares.] The circular concluded : " The sanction of the Court will have to be obtained. Under the articles of association, the preference shareholders have no vote at the extraordinary general meeting, but the directors will be glad to hear from you that you approve of the scheme."

In reply to this circular the holders of 1947 preference shares approved of the scheme and the holders of 2210 preference shares disapproved of it. The holders of the remaining 1143 preference shares were neutral.

By a special resolution unanimously passed and confirmed by the ordinary shareholders on October 8 and November 5, 1915, it was resolved that the capital of the company be reduced from 200,000*l.* to 82,536*l.* divided into 5300 4 per cent. cumulative preference shares of 12*l.* each and 1578 ordinary shares of 12*l.* each and that such reduction be effected (1.) by cancelling the unissued 700 preference and 2422 ordinary shares, (2.) by cancelling capital that was lost or unrepresented by available assets to the extent of 5*l.* per share upon each of the 5300 preference and 1578 ordinary shares, and (3.) by returning to the holders of the 5300 preference and 1578 ordinary shares respectively paid up capital to the extent of 3*l.* per share.

None of the preference shareholders attended or were represented at the first meeting, but letters written on behalf of those objecting to the scheme were read to the meeting before the resolution was submitted. The main grounds of objection were that having regard to article 64 their special rights could not be modified without the written sanction of the holders of two-thirds of the issued preference shares; that the loss on German and Austrian book debts and the depreciation of investments were only temporary; and that the whole scheme was most unfair as the result would be largely to benefit the ordinary shareholders at the expense of the preference shareholders, without any benefit accruing to the company generally. No notice of the second meeting was sent to the preference shareholders and none were present or represented thereat.

On February 28, 1916, the company presented this petition to confirm the reduction.

At the hearing the petition was supported by the holders of 1947 preference shares. It was opposed by the holders of 1889 preference shares, i.e., by the holders of more than one-third of the issued preference shares, on the ground that the requisite sanction of the preference shareholders under article 64 had not been obtained, that they had not been summoned to the meeting, and that the scheme was unfair to them.

Hon. Frank Russell, K.C., and *W. R. Sheldon*, for the company. The preference shareholders have no priority as to capital.

[ASTBURY J. That ought to have been stated in the petition. Where there is more than one class of shares, a reduction petition should state whether there is or is not any priority as to capital.]

The preference shareholders are shareholders in a company which by article 59 has express power to reduce its capital. Their only special right under the memorandum, clause 5, and article 62 is to a cumulative preferential dividend of 4*l.* per cent. on the nominal amount of the capital from time to time paid up on their shares. That right is not interfered with by the reduction: *Bannatyne* v.

Direct Spanish Telegraph Co. (1); *In re Barrow Hœmatite Steel Co., No.* 1 (2); and the reduction is not an alteration of any special right within the memorandum, clause 6, or article 64. Of course if the loss were not satisfactorily proved or the reduction were unnecessary the preference shareholders might object: *In re Barrow Hœmatite Steel Co., No.* 2. (3) But that is not the case here.

Secondly. The preference shareholders were not entitled to be summoned to meetings at which they could not vote. But they were in fact virtually invited to the first meeting and fully informed of all that was proposed to be done. The informality (if any) is cured by article 68.

Thirdly. The scheme on the whole is fair, and is supported here by the holders of 1947 preference shares as against the holders of 1889 preference shares. Five-sixths of the loss is clearly permanent. The remaining one-sixth due to loss on German and Austrian book debts and depreciation of investments is possibly only temporary. But any recovery in the value of these assets in the near future is far from probable.

J. W. Manning, for preference shareholders in support.

Cunliffe, K.C., and *Bryan Farrer*, for preference shareholders in opposition. The memorandum, clause 6, and article 64 are the bargain on which we took our preference shares with the rights specified in the memorandum, clause 5, and article 62, and as we hold more than one-third of the issued preference shares, our rights cannot be altered or modified without our written sanction under clause 6 and article 64: *In re Welsbach Incandescent Gas Light Co.* (4)

[ASTBURY J. In that case there were modifications in addition to the reduction. This is a mere reduction under article 59 which was part of the bargain on which you took your shares. Surely that cannot be an alteration or modification of your rights within article 64.]

The reduction decreases our fixed dividend. The bargain was that we should have a fixed dividend notwithstanding reduction from loss of capital. On the initial reduction to 15*l.* a share the dividend ought to be increased to 5⅓ per cent. on the nominal amount of the share. Of course we do not claim any dividend on the 3*l.* to be subsequently returned, but the 12*l.* shares should continue to bear a dividend of 5⅓ per cent.

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(1) (1886) 34 Ch. D. 287, 300, 301, 305.

(2) (1888) 39 Ch. D. 582, 596, 601—603.

(3) [1900] 2 Ch. 846, 855.

(4) [1904] 1 Ch. 87.

[ASTBURY J. Your dividend is only reduced because of the reduction of capital under article 59. That is in exact accordance with your rights under article 62. You are not entitled to 16*s.* a share in any event, but to 4 per cent. on the nominal amount of a share reducible under article 59.]

Our bargain was for 16*s.* a share unless we consented to the reduction.

Secondly. We were entitled to receive notices and attend and state our views at both meetings though we could not vote: see articles 68 and 131. We had informal notice of the first meeting, but no notice at all of the second meeting.

Thirdly. The scheme is unfair and solely in the interests of the ordinary shareholders. The loss on the German and Austrian book debts and on the investments is only temporary and the reduction ought not to be made during the war.

Hon. Frank Russell, K.C., in reply. The *Welsbach Case* (1) is not in point. Separate meetings were necessary not only on account of the extra modifications but because the special resolution for the actual reduction could not have been passed without the consent of the deferred shareholders, who held more than one-fourth of the capital. Article 131 merely provides a special mode of serving notices on members already entitled to receive them under the preceding articles. It does not apply to members not so entitled.

ASTBURY J., after stating the facts and pointing out that the special rights and privileges of the preference shares mentioned in the memorandum, clause 6, and article 64 evidently referred to the rights and privileges mentioned in the memorandum, clause 5, and defined by article 62, namely, the right to a cumulative dividend at 4*l.* per cent. per annum "on the nominal amount of the capital from time to time paid up or credited as paid up" on those shares, and pointing out that under article 59 the company had power to reduce its capital and under article 79 the ordinary shareholders

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(1) [1904] 1 Ch. 87.

(except in circumstances that had not arisen) alone had the right of voting at the company's meetings, continued: The result of the memorandum and articles shortly is this. Subject to the right of the company to reduce its capital by the votes of the ordinary shareholders in any manner sanctioned by statute these preference shares are to be of the denomination of 20*l*. each, and the only special right, privilege, or advantage attached to those shares is a cumulative 4 per cent. preferential dividend on the nominal amount of capital from time to time paid up or credited as paid up thereon.

It is first contended that the company has no power to reduce its capital, if any of the preference shares are included in the reduction, without the consent of the holders of two-thirds of the issued shares of that class. I do not think that is the right construction of these articles. The fair and proper construction is that the special rights, privileges, and advantages of the preference shareholders are those, and those only, stated in article 62, which is confined to the right to a cumulative preferential dividend on the nominal amount of capital from time to time paid up or credited as paid up, and that is without prejudice to the right of the company, under article 59, to reduce its capital in any manner authorized by statute, provided that the reduction obtains the sanction of the Court.

A number of authorities have been cited, which I do not propose to go through in detail. It has been held more than once that where there are different classes of shares the loss on a reduction in respect of loss ought to fall on those who would bear it in a winding-up: see *Bannatyne* v. *Direct Spanish Telegraph Co.* (1); and the view has been expressed by Kay J. (2), and I think by other judges, that prima facie where there are ordinary shares and preference shares with a preferential right to dividend but without preference as to capital a reduction of capital ought to fall upon both sets of shares equally. Later cases (3), however, have shown that a scheme is not necessarily one that the Court will not sanction if the loss, for good reasons, is made not to fall rateably upon the different sets of shares.

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(1) 34 Ch. D. 287, 300.

(2) *In re Union Plate Glass Co.* (1889) 42 Ch. D. 513.

(3) *British and American Trustee Corporation* v. *Couper* [1894] A. C. 399; *In re Credit Assurance and Guarantee Corporation* [1902] 2 Ch. 601.

The fact that preference shares are by the memorandum stated to be so many pounds per share with a definite preferential dividend on the nominal amount paid up, but without any priority as to capital, has never, that I know of, been relied upon as a reason for refusing, on that ground simpliciter, the sanction to a reduction of capital involving the preference shares, although, as indicated by Cozens-Hardy J. in *In re Barrow Hœmatite Steel Co., No.* 2 (1), where the loss is not satisfactorily proved and no good reason is shown for a reduction the preference shareholders are entitled to object to it as being unfair to them and unduly in favour of the ordinary shareholders. In the present case I will say a word about that under the third heading.

The second objection is that the preference shareholders have not been summoned to the meetings at which the resolutions for reduction were passed, although it was admitted they had no right to vote at the meetings. Prior to the meetings, which were held on October 8 and November 5 last year, a circular dated September 15 was sent to every shareholder stating precisely what was proposed, and drawing the shareholders' attention to the fact that under the articles the preference shareholders had no vote at the extraordinary general meeting, but that the directors would be glad to hear whether they approved the scheme or not. In answer to that circular replies were received from every single preference shareholder. The holders of 1947 preference shares were in favour of the scheme, and the holders of 2210 preference shares against it, the remaining holders being neutral, whereas at this present hearing in Court the holders of 1947 preference shares support the scheme and the holders of 1889 preference shares oppose it. In the circumstances I think in the first place that there is no provision under the articles that the preference shareholders shall be summoned to a meeting at which they are not entitled to vote, and secondly, even if they were entitled to be summoned, the omission in the present case was immaterial, as each preference shareholder had a full statement laid before him of exactly what was proposed to be done at the meeting, their views were obtained accordingly, and they could have come to the meeting if so minded.

Thirdly, it is objected that this scheme is not fair on its merits for two principal reasons. There is a small sum owing from German and Austrian debtors which the directors not unnaturally think they are not likely to recover. Secondly, a number of stocks have fallen in value, it is believed permanently; and those two sums together form something like one-sixth of the loss which is proposed to be taken into account in the reduction. The main loss has arisen from an obviously permanent loss of assets, and on the whole, and upon the evidence before me, I do not see any sufficient ground for holding that this is not a just and equitable scheme, sanctioned as it is by the whole of the ordinary shareholders and supported here by the holders of 1947 preference shares as against opponents holding 1889, nor that the persons entitled to vote for a reduction of capital in this company have not arrived at a scheme which is fair and just in the circumstances.

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(1) [1900] 2 Ch. 846.

Solicitors: *Crosley & Burn*; *Walter J. Payne*; *Kekewich, Smith & Kaye.*

G. R. A.

SCHWANN *v.* COTTON.

[1914 S. 3130.]

C. A.
1916
June 27, 28, 29;
July 13.

Easement—Water—Underground Pipe—Severance of Two Tenements—Appurtenances—Continuous and "Apparent" Easement—Implied Grant as between the Two Tenements—Water conducted from Well on Stranger's Tenement—Well fed by Percolation—No Grant from Stranger—Twenty Years' Enjoyment—Clam—Precario—Jus tertii.

Testator, who died in 1902, by his will made in 1898 devised Blackacre, of which he was then in occupation, and the appurtenances to the plaintiff's predecessors in title, and Whiteacre and the appurtenances to the predecessor in title of the present owner, whose husband and gardener were the defendants.

Blackacre was supplied with water by an underground pipe leading from a stone well at Greenacre through Whiteacre. This pipe was openly laid by the testator in 1893, but there was no evidence as to what (if any) arrangement was made with the then owner of Greenacre. The supply was originally used for the house and garden of Blackacre, but after 1894 it was used for the garden only, though the house connection was still available.

The well was fed by percolation from some untraceable spring,

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and the supply was practically continuous. The well had long since been covered by a stone slab and sods, and when the present owner of Greenacre bought in 1912 he was unaware of the existence of the well or the pipe and was told there were no easements.

The present owner of Whiteacre purchased in 1913 without notice of the existence of the pipe or any easement. In 1914 a new carriage drive was made through Whiteacre, and the pipe being then discovered and found to be in the way, the defendants, as agents of the owner, who was abroad, cut and removed part of it and stopped the flow of water, whereupon the plaintiff brought an action for an injunction :—

Held, that the effect of the will was to devise Blackacre with the right of passage of such water as might flow through the pipe, and to devise Whiteacre subject to that right.

Phillips v. *Low* [1892] 1 Ch. 47 and *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31 followed.

Held, also, that the pipe easement, not being determinable at the will of the owner of the alleged servient tenement Whiteacre, was not precarious as between the owners of Blackacre and Whiteacre, and was therefore capable of creation by implied grant.

Dictum of Lord Abinger C.B. in *Arkwright* v. *Gell* (1839) 5 M. & W. 203, 233, approved.

Held, also, that the defendants were not entitled to rely on an alleged jus tertii in the owner of Greenacre to stop the water on the ground that the enjoyment against him had been " clam," and that his well was only fed by percolating water.

Held, also, that, the easement being one which depended not on implied covenant, but implied grant, the maxim that a grantor cannot derogate from his own grant applied, and that the present owner of Whiteacre could not therefore rely on the equitable defence of being a purchaser for value without notice.

Held, also, that the condition that the enjoyment must be nec vi, nec clam, nec precario, was a condition necessary to the acquisition of an easement by prescription and had no reference to and was in fact in the nature of things excluded where the acquisition was by grant.

Dictum of Pollock C.B. in *Wood* v. *Waud* (1849) 3 Ex. 748, 779, explained.

Decision of Astbury J., ante, p. 120, affirmed.

APPEAL from a decision of Astbury J. (1)

By his will dated July 21, 1898, Colonel Richard Cotton, who was the owner of two adjoining properties at Freshwater known as Braxton Cottage, of which he was then in occupation, and Malta Cottage, with the gardens and fields respectively attached thereto, devised Braxton Cottage and the appurtenances to the predecessors

(1) Ante, p. 120.

in title of the plaintiff and his lessor, and Malta Cottage and the appurtenances to the predecessor in title of the present owner, whose husband and one Hayles, her gardener, were the defendants.

The testator died on April 5, 1902. At that time Braxton was partly supplied with water by an underground pipe leading from a well in an orchard now belonging to one Nugent. This pipe was openly laid by the testator in 1893 at the request of an incoming tenant of Braxton, but there was no evidence as to what (if any) arrangement was made with Nugent's predecessor in title, or who he was. The pipe was carried from the well under the orchard grounds, then under a high road, and then under the grounds of Malta to Braxton. It was connected with a cistern on the first floor of Braxton Cottage and with two standpipes in Braxton garden. An analysis of the water proving satisfactory, it was at first used for the house and garden, but in 1894 the tenant obtained a house supply from the local waterworks, and the supply from the well was only used for the garden, though the connection with the house still remained and could be used at any time.

Until the defendants' interference in 1914 the pipe had remained unaltered and undisturbed, and the occupiers of Braxton had enjoyed a continuous supply of water through it. Except during one or possibly two dry summers, when there was some temporary deficiency, the supply, though not very copious, had been sufficient for daily garden use by hose or otherwise during all periods of the year.

The well was a round dug well six feet deep by three feet in diameter. It was lined with uncemented stone blocks at the bottom and sides. The evidence showed that it was obviously spring-fed, though not where the spring was or how the water was collected in the well, but for the purposes of the case the Court assumed that it was collected by percolation through the bottom and sides. In 1893 it was an old open well, and the outflow pipe was placed in it three and a half feet from the bottom. The work was done quite openly and without any concealment. The underground pipe was of course invisible, but the outflow pipe was visible and apparent in the well. Apart from a certain amount of mud that had collected at the bottom in the course of years the water was still good and clear.

The well and orchard now belonged to Nugent, who bought the

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property on July 13, 1912. The well had been covered up with a stone slab and sods by some previous owner and had become covered with grass, so that Nugent had no notice of the existence either of the well or the pipe, and in answer to the usual requisition as to easements he was informed that his vendor was not aware of any.

On January 31, 1913, the wife of the defendant Cotton purchased Malta for 2000*l.* without any notice of the existence of the pipe or any easement.

The defendant Cotton was not in any way related to the testator.

In 1914 a new carriage drive was made through Malta. The pipe being discovered and found to be in the way, the defendant Hayles, by the direction of the defendant Cotton acting as agent for his wife, who was abroad, cut and removed part of the pipe and stopped the flow of water. At the time of this cutting the defendants had become aware of the plaintiff's claim.

On November 3, 1914, after some preliminary correspondence, the plaintiff commenced this action for an injunction and damages.

On December 4, 1914, upon motion for an injunction, the defendants were restrained until judgment or further order from cutting, removing, or otherwise interfering with the pipe and were ordered to restore and make it good. The pipe was then restored and carried under the drive, and the flow was again satisfactory.

The action was tried before Astbury J. on February 28, 29, and March 6, 7, and 8, 1916, who on March 17 granted the injunction sought.

The defendants appealed.

Giveen, for the appellants. At the time of the devise in 1902 the right (if any) against the owner of the well was an inchoate easement not known to the law. The potentiality of acquiring an easement is not a right or easement which is recognized: *Greenhalgh* v. *Brindley* (1); and the doctrine of implied grant is inapplicable. An owner cannot have an easement over part of his own land. An easement which depends wholly on the will of a third person is precarious and unknown to the law: *Burrows* v.

(1) [1901] 2 Ch. 324.

Lang. (1) There is nothing to prevent Nugent at any time from stopping the flow of water from the well. *Arkwright* v. *Gell* (2) is the only case in which it has been suggested that such a right as this can be granted. If it is not an easement, then it cannot be attached to a freehold. If it is a licence, it would cease on the death of the licensee. In order to establish the right of the respondent to an easement by prescription the onus is on him to show open and continuous user from which the Court can infer acquiescence on the part of the owner of the servient tenement: *Tickle* v. *Brown.* (3) There is no evidence here that any one knew of the existence of the well. The inference is that the well was covered up by the person whose interest it was to use the water. The evidence is all against there being an open and notorious user. It is submitted, therefore, that no right has been acquired against Nugent, who cannot be deemed to have acquiesced in a " clam " enjoyment of which he was wholly unaware: *Dalton* v. *Angus.* (4) As was said by Vaughan Williams L.J. in *Union Lighterage Co.* v. *London Graving Dock Co.* (5), " According to that case, if there is no knowledge, there is an end of prescription." Further, there was no implied grant in 1902, first, because the alleged easement was not continuous and apparent, and, secondly, because the flow of water was precarious. The easement was not necessary to the enjoyment of the property granted, for the property was already supplied with water from a neighbouring waterworks, and the easement did not therefore pass by implied grant: *Wheeldon* v. *Burrows.* (6) The proposition in the judgment of the learned judge, based on *Pomfret* v. *Ricroft* (7), that " As a general rule a grantee of land is entitled by implied grant to any easement in the land of his grantor which is necessary to render the land as granted capable of enjoyment," is too widely stated, and the example given by him is not correct: see *Cocker* v. *Cowper.* (8) It is not every easement which is convenient to the enjoyment of the property granted that passes by an implied grant, but only such easements as, though not absolutely, are approximately

(1) [1901] 2 Ch. 502.

(2) 5 M. & W. 203.

(3) (1836) 4 Ad. & E. 369, 382.

(4) (1881) 6 App. Cas. 740, 760, 774, 787, 801, 827.

(5) [1902] 2 Ch. 557, 563.

(6) 12 Ch. D. 31.

(7) (1669) 1 Wms. Saund. 321, 323.

(8) (1834) 1 C. M. & R. 418.

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necessary to its enjoyment: *Polden* v. *Bastard* (1); *Pearson* v. *Spencer* (2); *Ewart* v. *Cochrane* (3); *Watts* v. *Kelson.* (4)

Wood v. *Waud* (5) shows how limited are the rights of water. There can be no such possessory right of water as will give a right against a third party. The word "appurtenances" in the will rather cuts down the general words implied by s. 6 of the Conveyancing Act, 1881: *In re Peck and London School Board.* (6) The learned judge was therefore wrong in granting the injunction, and the appeal should be allowed.

Micklem, K.C., and *A. F. Topham,* for the respondent. The question depends entirely on the true construction of the will of the testator. The respondent claims Braxton "and the appurtenances." The test is what was the position in 1902 when the testator died. Could he at that date, having sold Braxton, a month later have cut off the water supply to it? It is submitted that he could not have done so. The effect of the will was to devise Malta subject to the rights of Braxton: *Phillips* v. *Low.* (7) It makes no difference to the respondent where the water comes from. It was proved at the trial that the respondent and his predecessors in title had for twenty years enjoyed an easement of water from the well. It has been assumed by the appellants that at the date of the will the testator held by licence or trespass, but after twenty years' open user the Court will presume that the user originated in a grant. It is not necessary for the respondent to prove an easement as against Nugent. He has proved a de facto user for twenty-three years. As regards the ownership of the pipe through Malta, the authorities show that it is vested in the grantee of Braxton: *Nicholas* v. *Chamberlain* (8); *Wheeldon* v. *Burrows* (9); *Goodhart* v. *Hyett.* (10) It passed by implied grant on the devise of Braxton. *Watts* v. *Kelson* (4) would be conclusive in favour of the respondent if the well had been in Malta. *Burrows* v. *Lang* (11) has no bearing on the present case, as here the pipe was laid solely for the purpose of supplying Braxton with water. *Union Lighterage Co.* v. *London Graving*

(1) (1865) L. R. 1 Q. B. 156.

(2) (1861) 1 B. & S. 571; (1863) 3 B. & S. 761.

(3) (1861) 4 Macq. 117.

(4) (1871) L. R. 6 Ch. 166.

(5) 3 Ex. 748.

(6) [1893] 2 Ch. 315.

(7) [1892] 1 Ch. 47.

(8) (1606) Cro. Jac. 121.

(9) 12 Ch. D. 31.

(10) (1883) 25 Ch. D. 182, 185.

(11) [1901] 2 Ch. 502.

Dock Co. (1) is not relevant on the question of implied grant, the question there being one as to implied reservation. *Wood* v. *Waud* (2) was not a case like the present; there was there no grant and no prescription. The doctrine that a grantor cannot derogate is as applicable to a case of a devise as to a grant of two properties to different persons. The easement here was apparent and continuous—*Dalton* v. *Angus* (3); Gale on Easements, 8th ed. p. 111—and must have been known to the testator.

It is said that you cannot have an implied grant of something which is not an easement known to the law.

[WARRINGTON L.J. The easement to be implied is the right to the free passage of water, and that is a legal easement. It does not depend upon there being water to flow.]

An implied grant creates a legal easement, and purchase without notice is immaterial: *Cable* v. *Bryant.* (4)

Giveen in reply. What is claimed here is an extension of the doctrine of *Tulk* v. *Moxhay.* (5) There must be a legal right to water before you can have a passage of water. There is here no legal right to the flow of water. It is sought in this case to restrict the right of the appellants to build on their own land in a certain way in order to give effect to an easement not known to the law.

The observations of Lord Abinger in *Arkwright* v. *Gell* (6) were mere dicta. They were not approved in *Wood* v. *Waud.* (7) A right to prevent a digging or building on one's land may be created by restrictive covenant, but it cannot be acquired by virtue of something which is not a legal easement; it cannot be acquired by implied grant. The law will not impose such an obligation by implication. The case is within the mischief of the doctrine which prevents the implication of an easement which interferes with the use of the freehold. Nugent can stop the flow of water at any time. The easement is therefore precarious: *Burrows* v. *Lang.* (8) Whatever the right may be called, or however it may be wrapped up, what is sought here is to prevent the use of the freehold without any connection with any legal easement.

Cur. adv. vult.

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(1) [1902] 2 Ch. 557.
(2) 3 Ex. 748.
(3) 6 App. Cas. 821.
(4) [1908] 1 Ch. 259.
(5) (1848) 2 Ph. 774.
(6) 5 M. & W. 203.
(7) 3 Ex. 748, 778.
(8) [1901] 2 Ch. 502.

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July 13. LORD COZENS-HARDY M.R. read the following judgment:—There are at or near Freshwater in the Isle of Wight three properties known as (1.) Nugent's, (2.) Malta, and (3.) Braxton. Nugent's is the highest and Braxton is the lowest. In 1893 a pipe was laid down from a well in Nugent's through Malta to Braxton. The plaintiff is now tenant in occupation of Braxton. The defendant Cotton and his wife are in occupation of Malta. The well is not deep, but the lie of the land is such that water flows down from the well through a one-inch delivery pipe to Braxton. The pipe, so far as I can judge from a plan, was several hundred yards in length. It was laid down openly and at considerable cost. It crossed a public road, but, as is almost always the case with pipes, it was not visible after the pipe was laid down throughout its whole course. The well is fed by a spring, and from 1893 until 1914 water passed continuously and without interruption to Braxton. There are two standpipes in Braxton. For some years it was the sole supply of water to Braxton House. After a time water for the house was obtained from some neighbouring water company, and thenceforward the water from the well was used for the garden and for the stables. The defendants cut the pipe where it passes through Malta and thus deprived the plaintiff of this supply of water. Hence this action.

In these circumstances several questions arise. The first question is as to the relations existing between the plaintiff and the defendants. Colonel Cotton, who lived at Braxton, by his will in 1898 devised Malta "and its appurtenances" to his son, through whom the wife of the defendant Cotton claims. He also devised his freehold hereditaments, known as Braxton Cottage, "and the appurtenances" to persons through whom the plaintiff claims. The testator died in 1902. At the date of the will the testator was in actual occupation of Braxton, which was supplied by water passing through the pipe. It seems to me that in these circumstances it must be held that the effect of the will was to devise Braxton, with the right of passage of such water as might flow through the pipe, and that the devise of Malta was a devise subject to that right. The decision of Chitty J. in *Phillips* v. *Low* (1) is an express authority on this point. He applied to a case of a devise of two portions of property by the same will the well-established doctrine where there are two conveyances of the same date, and held that there is an implied grant where one of the two properties is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state in which it was when devised, upon the adjoining tenement. So here Braxton was, at the date of the testator's will and death, in fact enjoying the passage of water through the pipe passing through Malta. In my opinion it is not necessary to consider whether the property in the pipe itself was, so far as it passed through Malta, vested in the devisee of Braxton (see *Nicholas* v. *Chamberlain* (1)) as part of the house, according to the view expressed by James L.J. in *Wheeldon* v. *Burrows* (2), or whether without passing the property in the iron pipe the devise of Braxton gave an easement allowing the passage of water through the pipe. In either view the defendants cannot justify the interference with the pipe.

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(1) [1892] 1 Ch. 47.

The decision of this Court in *Wheeldon* v. *Burrows* (3) seems to me greatly to assist the plaintiff. Thesiger L.J., in delivering the judgment of the Court, says: "On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted."

It is said, however, that the law does not recognize such a right because there is nothing to show that, as against Nugent, there is any right to the flow of water, and that therefore the alleged easement or quasi-easement is precarious and such as the law does not recognize.

In my opinion the objection is not valid. The circumstances in which the pipe was inserted in the wall of the well and the pipe was laid down in 1893 have not been proved. If the plaintiff was claiming, as against Nugent's, a right to a flow of water from the well the burden would of course be upon the plaintiff. But I am disposed

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(1) Cro. Jac. 121.

(2) 12 Ch. D. 31, 60.

(3) 12 Ch. D. 31, 49.

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to think that when the plaintiff has established an uninterrupted user and enjoyment for more than twenty years the onus may be shifted, and the defendants, who seek to escape from the effect of such enjoyment, may have cast upon them the burden of showing what did happen in 1893. I see no reason why a grant by deed in 1893 from Nugent's to Colonel Cotton should not be presumed. I do not, however, base my decision on this theory. There is no legal difficulty in an implied grant of a right of passage through the pipe of such water as may come to the pipe without reference to the question whether the owner of the spring head might not have a right to divert it altogether. It is one thing to say that the owner of Nugent's might divert the spring and it is another thing to say that the devisee of Malta can divert and interfere with the pipe through which water passes to Braxton.

On principle I cannot see why the precarious origin of an artificial course should have any bearing upon the rights of persons lower down as against each other. In *Arkwright* v. *Gell* (1) Lord Abinger C.B., after deciding that no right can be acquired as against water passing from a mine through a sough, says: "No right is acquired as against the owner of the property from which the course of water takes its origin: though, as between the first and any subsequent appropriator of the watercourse itself, such a right may be acquired." It is true that this is a dictum not necessary for the decision of the case, but it seems to me to be entitled to great weight and to be in accordance with good sense.

It is then said that although Mrs. Cotton's predecessor claims under the same will as the plaintiff's predecessors, yet she is a purchaser for value without notice and cannot be affected by the right claimed by the plaintiff, and it is urged that for some years the existence of the pipe and watercourse, though visible at Braxton, was not visible at Malta, and, further, that a stone at the top of the well prevented any one from seeing that there was a pipe in Nugent's, I am not satisfied that this is any answer to the plaintiff's case, which rests not on an implied covenant but on implied grant. A grantor must not derogate from his own grant. That is a common law doctrine and must be enforced irrespective of the equitable doctrine of notice. If for example an actual deed of grant could now be produced from Nugent to Colonel Cotton, the owner of Braxton and Malta, it would be no defence for the present owner of Malta to say "I never heard of it before I purchased." If the case depends upon the implied grant contained in the will, I think *Tulk* v. *Moxhay* (1) and similar cases have no application. This view is in accordance with Neville J.'s judgment in *Cable* v. *Bryant.* (2)

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(1) 5 M. & W. 203, 233.

It was argued, though faintly, that it was wrong to burden Malta with a right in the nature of an easement which was not necessary for the use and enjoyment of Braxton. But the word "necessary" must not be taken in a rigid sense. The better phrase is that which is used by Lord Campbell in *Ewart* v. *Cochrane* (3), "convenient and comfortable enjoyment of the property," and it cannot be doubted that a constant supply of water, available either for the house or for the garden, is within those words. It can make no difference that Braxton has a right upon payment to obtain water from a water company.

Various other points were raised in argument before the learned judge who granted relief to the plaintiff, but I do not think it necessary further to refer to the numerous authorities cited. In my opinion, for the reasons I have indicated, the plaintiff is entitled to the relief granted by the learned judge, and the appeal must be dismissed with costs.

PICKFORD L.J. read the following judgment:—In 1893 Colonel Cotton, whom I shall call the testator, owned a piece of land at Freshwater in the Isle of Wight on which there were two houses, one called Malta and one called Braxton. In that year he demised a part of this land on which the house Braxton stood to a Colonel Money and agreed to give him a supply of water to that house. He retained for himself the rest of the land with the house Malta. Adjoining this land, but separated from it by a highway, there was some land belonging at that time to a Mr. Thatcher, which afterwards became the property of Mr. Nugent and was referred to during the argument as Nugent's land. I shall refer to these three pieces of land as Malta, Braxton, and Nugent's land respectively. The supply of water was obtained by the insertion of a pipe into a well

(1) 2 Ph. 774.

(2) [1908] 1 Ch. 259.

(3) 4 Macq. 117, 123.

on Nugent's land which passed through that land for some distance, then under the highway separating it from Malta, through Malta and a part of Braxton, and into the cistern of that house and to standpipes in the garden belonging to it. At first the water passing through this pipe was the only water supply to Braxton, but after a time Colonel Money obtained a supply for the house from a local water company, and the water passing through the pipe was only used for garden purposes. This user continued till the year 1914, by which time the source from which the water came and the existence of the pipe passing through Malta seems to have been forgotten, or at any rate not known to the then occupiers of the three pieces of land, though the supply was continuously used by the occupiers of Braxton and the source of the supply and the course of the pipe could easily have been ascertained.

In 1902 Colonel Cotton died, leaving Malta with its appurtenances to his son, and Braxton with its appurtenances to his wife and daughters. The plaintiff derives his title from the wife and daughters, and the defendant Cotton's wife, in whose interest the defendant Cotton defends this action, from the son.

In 1914 the defendant Cotton made a new drive from the house Malta, and in doing so the workmen discovered the pipe leading to Braxton and cut it while making the drive. The defendant Cotton was then away from home, and his gardener, on the remonstrance of the plaintiff, very properly repaired the pipe till he received instructions from his master. The defendant Cotton ordered the pipe to be cut again, and the plaintiff instructed his solicitor to write to him claiming a right to have the supply of water restored. The defendant Cotton replied in a tone which practically made litigation inevitable. There may have been some reason for his adopting this tone, though I see none in the evidence, and therefore I shall say no more about it; but I think there is little doubt that an arrangement could have been made which would not have materially interfered with the interests of either party. However, none was made, and we have now to decide the rights of the parties. There is no doubt that at the time the pipe was inserted into the well on Nugent's land and carried across the road through Malta to Braxton it was done openly and with the knowledge of all concerned in the land through which the pipe passed, but there is nothing to show on what terms the supply was obtained from the then owner of Nugent's land.

The defendant Cotton contends that under these circumstances the plaintiff has not proved any right against Nugent's land to a supply of water, and therefore the right claimed to a passage of that water through the pipe under the defendant's land is a right not known to the law, and cannot be enforced against him, who, as representing his wife, is a purchaser without notice. He also contends that the supply was precarious as it might have been cut off by the owner of Nugent's land, and that it was not apparent or necessary to Braxton. I do not think it necessary to decide the plaintiff's rights against Mr. Nugent, who has up to now not interposed in the dispute at all, though he was a witness at the trial. He is not a party to the action or before the Court at all, and I wish to say nothing that may prejudice the question between him and the plaintiff if it ever should arise. I will assume for the purposes of this case that the plaintiff has not such a right against him. Under these circumstances, has the plaintiff a right as against the defendants? I think he has.

A great part of the able argument of the defendants' counsel was devoted to showing that such a right could not be acquired by user and prescription. I do not think it necessary to deal with this part of the argument, because I do not think that the plaintiff's right depends upon user or prescription, but upon grant. I can see no objection in law to a grant by the testator of a right to pass through a pipe under his land a supply of water in fact existing even though a third party may have a right if he wish to cut off that supply.

When the testator devised Malta and its appurtenances to the defendant Cotton's predecessor in title and Braxton and its appurtenances to the plaintiff's predecessor the effect was in my opinion the same as if he had made two simultaneous conveyances to the same effect, and in that case Braxton would pass with the rights of passage of such water as in fact flowed through the pipe, and Malta subject to such rights: see *Phillips* v. *Low*. (1)

If this were a case where Braxton had been conveyed and Malta retained, the owner of the latter could not derogate from his grant of the right to use the pipe, and in the case of separate devises of the two pieces of land I think the effect is the same, and that the defendant, as claiming under the testator by virtue of the devise of Malta and purchase from the devisee, is in the same position.

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(1) [1892] 1 Ch. 47.

I think, therefore, that the appeal should be dismissed. I have not thought it necessary to discuss the authorities at any length as they are sufficiently dealt with by the other members of the Court.

Warrington L.J. read the following judgment:—The plaintiff is the occupier of a parcel of land near Freshwater in the Isle of Wight with a house thereon. I shall refer to this as the plaintiff's land. The defendant Cotton and his wife are in the occupation of, and the defendant's wife is the owner of, a piece of land adjoining the plaintiff's land. This I shall refer to as the defendant's land. The defendant Cotton is in substance defending this action on behalf of his wife.

The plaintiff claims, as an easement appurtenant to his land, the right to maintain a pipe in the defendant's land and to the uninterrupted flow through such pipe of water from a well in the land of a third person with which the pipe is connected. The pipe has been cut and the water supply thus interrupted by the defendant Cotton and the defendant Hayles, who is his servant and acted under his instructions.

This action has been brought for the purpose of establishing the right claimed by the plaintiff and for an injunction protecting that right. Astbury J. has decided in favour of the plaintiff. The defendants appeal. The plaintiff does not claim the easement by prescription either at common law or under the statute, but as having been created by disposition of the common owner of the plaintiff's and the defendant's land.

The facts are as follows: In the year 1893 the plaintiff's and the defendant's land were owned by one Colonel Richard Cotton. In that year he granted a lease of the plaintiff's land to one Colonel Money, and in pursuance of an arrangement entered into between lessor and lessee for providing a supply of water to the house and garden an iron pipe was laid leading from a well on a parcel of land which I will call Nugent's land, through which it passed for about 200 feet; it was then carried for some distance under a public highway, then passed through the defendant's land, and ultimately reached the plaintiff's house. Two standpipes were constructed in the plaintiff's garden, and in that manner a water supply was obtained both for the house and for the garden. The expense was borne by lessor and lessee in equal shares. Whether any and what arrangement was made with the then owner of Nugent's land does not appear, but the work was obviously not done secretly. Nugent's land must have been opened for about 200 feet in order to lay the pipe, and the highway also must have been opened. Nugent's land is at a higher level than the defendant's and the plaintiff's land, and the water therefore reached the plaintiff's land by gravitation. The water conveyed by the pipe constituted for some time the water supply of the house, but some months after the pipe had been laid the water from a company's main was obtained and the water from the pipe was not used in the house. It, however, remained as an auxiliary supply, and it has always, since the pipe was first laid, been the only water supply of the garden.

Colonel Cotton died in the year 1902, having by his will devised the defendant's land with the appurtenances to his son and the plaintiff's land with the appurtenances to his wife and daughters. The plaintiff claims under the latter devisees. The defendant Cotton's wife purchased the defendant's land from the testator's son. At the time of the purchase she did not know of the existence of the pipe in question or that the plaintiff's land obtained water through the land she bought.

The first question is, Did the will upon its true construction operate to confer on the devisees of the plaintiff's land the right to insist on the maintenance of the pipe in the defendant's land and the uninterrupted flow of water through it ? In my opinion it clearly did. The owner of the two pieces of land enjoyed in respect of the plaintiff's land a supply of water by means of the pipe in the defendant's land. The plaintiff's land was in fact —to adopt the expression used by Erle C.J. in *Pearson* v. *Spencer* (1)—necessarily dependent, in order to its enjoyment in the state it was in when devised, upon the defendant's land. That being the case, I think it is clear that the devise of the plaintiff's land with the appurtenances operated to create as a right appurtenant to the plaintiff's land that which had been previously enjoyed as an incident to the common

(1) 3 B. & S. 761, 767.

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ownership and to impose a correlative burden upon the defendant's land: *Pearson* v. *Spencer.* (1)

But the defendants contend that the right so created was not a legal easement, but was dependent on a merely equitable obligation imposed on the devisee of the defendant's land, and that as Mrs. Cotton purchased without notice of the existence of the circumstances giving rise to the obligation she is not bound thereby.

There is nothing in the nature of the right in question which would prevent its being a valid legal easement. The right to the free passage of water through my neighbour's land and for that purpose to maintain a pipe or other channel therein is one of the commonest forms of easement. So far as any objection founded on the nature of the right itself is concerned any such objection would fail, and the right must, in my opinion, be held to be validly created as a legal easement.

But the defendants contend that the plaintiff has failed to establish as against the owner of Nugent's land a right to the continuance of the supply of water from the well, and that as against him the plaintiff's enjoyment must be taken to be precarious, and they maintain that this circumstance renders the enjoyment precarious as against the defendant also and prevents the possibility of the right being claimed as a legal easement.

In my opinion the question whether or not as against the owner of Nugent's land the plaintiff can establish a legal right to a continuance of the supply is irrelevant to the question whether he is entitled as against the defendant to the right to the free passage of the water. Many artificial watercourses must depend for their supply upon springs or percolating water, and it has never, as far as I am aware, been suggested that a grant by an upper proprietor to a lower of a right to the accustomed flow is in any way affected by the fact that the supply might at any time be cut off by the lawful interference of a third person with the flow of percolating water. So in this case I cannot think that the right of the plaintiff as against the defendants can be affected by the fact, if it be so, that the owner of Nugent's land might lawfully cut off the supply. He is not before the Court, and I think it is undesirable to discuss upon necessarily incomplete materials the question whether the plaintiff has in fact any legal right as against him ; on the assumption that this should be answered in the negative, I should still be of opinion that the plaintiff must succeed.

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(1) 3 B. & S. 761.

The fact is that the well-known condition that enjoyment must be nec vi, nec clam, nec precario is a condition necessary to the acquisition of an easement by prescription, and has no reference to and is in fact in the nature of things excluded where the acquisition is by grant. Reliance was placed upon a dictum contained in the judgment of Pollock C.B. delivering the judgment of the Court in *Wood* v. *Waud.* (1). Dealing with Bowling Sough, an artificial watercourse constructed by certain mine owners for the purpose of draining their mine, and the rights of the landowners through which the sough passed, he says: "The proprietor of the land through which the Bowling Sough flows has no right to insist on the colliery owners causing all the waters from their works to flow through their land. These owners merely get rid of a nuisance to their works by discharging the water into the sough, and cannot be considered as giving it to one more than another of the proprietors of the land through which that sough is constructed ; each may take and use what passes through his land, and the proprietor of land below has no right to any part of that water until it has reached his own land, —he has no right to compel the owners above to permit the water to flow through their land for his benefit ; and, consequently, he has no right of action if they refuse to do so." But all that this statement comes to is this, that where the right claimed by the several proprietors depends upon user only the precarious nature of the original supply may affect the user of all the owners and prevent the acquisition by mere user of any legal right to a continuance, but he does not say that such a circumstance would prevent an owner from creating such a legal right by grant. No other authority which in any way touches the point has been cited, and I do not believe that an authority in support of the defendants' proposition could be found.

On the whole I am of opinion that the appeal fails and must be dismissed.

LORD COZENS-HARDY M.R. The appeal will be dismissed with costs.

Solicitors : *Cohen & Cohen ; Beale & Co.*

W. I. C.

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(1) 3 Ex. 748, 779.

C. A.
1916
June 30;
July 3, 4, 5,
17.

BRITISH UNION AND NATIONAL INSURANCE COMPANY v. RAWSON.

[1915 B. 921.]

Indemnity—Assignability to Principal Creditor—Married Woman Debtor—Fruitless Judgment against Separate Property—Amount recoverable under Indemnity.

The plaintiff company recovered judgment against a married woman in respect of unpaid calls on shares against which the defendant had indemnified her. Not having any separate property, she assigned the benefit of her right of indemnity to the plaintiff company, who, after written notice of the assignment, sued the defendant for the full amount of their judgment:—

Held, that although the married woman had paid nothing, nevertheless she was entitled to have the amount of the calls paid by the defendant either to the plaintiffs or to herself; that this right was capable of assignment; and that the plaintiffs as assignees were entitled to have it enforced by an order directing payment to themselves.

Decision of Astbury J., ante, p. 152, affirmed.

In re Perkins [1898] 2 Ch. 182 applied.

Rendall v. *Morphew* [1914] W. N. 422; 84 L. J. (Ch.) 517; 112 L. T. 285, and *British Dominions General Insurance Co.* v. *Duder* [1915] 2 K. B. 394 distinguished.

Inasmuch as the measure of the liability of the indemnifier is the liability, not the capacity, of the indemnified to pay, the fact that the married woman had no immediate separate property afforded no defence to the action, because the liability under the judgment remained and could be enforced against any future separate property she might acquire.

Semble that, in the case of an insolvent debtor, the result of the decisions is to give to a contract to indemnify him the same effect as if it were a guarantee to the principal creditor of payment of the debt.

APPEAL by the defendant from a decision of Astbury J. (1), where the facts are stated, the following summary being sufficient for the purposes of this report.

In 1910 Jane Bond, a married woman, agreed to sell to the defendant 840 shares in the plaintiff company of 1*l*. each with 15*s*. unpaid, of which shares she was then the registered owner. She executed a transfer in the defendant's favour, but at his request, and upon his agreeing by letter to indemnify her against all liability in respect of the shares, she substituted the name of one Bill as transferee. Bill was subsequently registered as owner of the shares. He was in fact an infant, known to be so by the defendant but not by Jane Bond.

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(1) Ante, p. 152.

In 1912 the plaintiff company went into liquidation. The liquidator, discovering that Bill was an infant, placed the name of Jane Bond on the list of contributories in respect of the shares, and recovered judgment against her for the unpaid calls and interest in what is known as the amended form in *Scott* v. *Morley*. (1)

Having no separate property, Jane Bond by a deed dated February 8, 1915, assigned to the plaintiff company the benefit of the defendant's contract of indemnity above mentioned. The company then gave written notice to the defendant of this assignment, and on March 15, 1915, commenced this action against him to recover the amount of the judgment and subsequent interest.

Upon the points of law raised by the defence Astbury J. decided that the right of indemnity was separate property of Jane Bond and capable of assignment to the plaintiff company as principal creditors, and he gave judgment for the plaintiff company for the amount of the unpaid calls, agreed at 630*l.*

Other minor defences raised both in the Court below and on appeal are not material to be reported.

Maugham, K.C., and *Dighton Pollock*, for the appellant. This covenant of indemnity was not assignable. In bankruptcy it has been held that a trustee in bankruptcy can sell the benefit of such a covenant, but it has never been held otherwise assignable. In equity there are cases which show that it is not necessary that the indemnified person should have been called upon to pay in order to get relief under the covenant. But it has never been decided that a married woman, who is only liable to the extent of her separate property, of which in this case she has none, can recover the whole amount from the person giving the indemnity without having herself actually made any payment.

First, Mrs. Bond could not have maintained an action of this kind at law. If she had paid anything she would have been entitled to recover what she had paid, and that right would have been legally assignable; but she has, in fact, paid nothing. She had therefore

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(1) (1887) 20 Q. B. D. 120.

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merely a bare right of indemnity. Her only right, if any, was in equity, when she could call on the defendant either to pay the plaintiff company or to set aside an indemnity fund.

Secondly, the benefit of a covenant of indemnity is not assignable. It is not a chose in action assignable under the Judicature Act. Assuming that the agreement to indemnify Mrs. Bond is binding on the appellant, it was not assignable by her. *In re Perkins* (1) was a decision under the bankruptcy law and does not apply to a married woman who cannot be made bankrupt. Assignments of rights of action of this kind are invalid: *Prosser* v. *Edmonds* (2); *Fitzroy* v. *Cave* (3); *May* v. *Lane*. (4) The right to sue the appellant is an equitable right personal to Mrs. Bond and she alone can enforce it.

[PICKFORD L.J. referred to *Swan and Cleland's Graving Dock and Slipway Co.* v. *Maritime Insurance Co.* (5)

WARRINGTON L.J. referred to *Tailby* v. *Official Receiver*. (6)]

A bare right of indemnity is not assignable: *Rendall* v. *Morphew*. (7) It is not assignable if the guarantor is interested in seeing that the money is applied to a particular purpose: *In re Richardson* (8), which was discussed in *In re Law Guarantee Trust and Accident Society*. (9)

[PICKFORD L.J. referred to *Lacey* v. *Hill*. (10)]

At the present moment Mrs. Bond is not entitled to any indemnity: *Lloyd* v. *Dimmack*. (11)

Thirdly, a married woman has no right of action in a case like this. A contract to indemnify her is a contract to safeguard her separate property. She contracts only in respect of her separate property; and this is a quasi-proprietary liability. So if this is assignable the amount recoverable is limited to the amount of her separate property: *Scott* v. *Morley*. (12) It is not necessary to prove the existence of separate property before such an order is made, although it will be fruitless till separate property is acquired: Lush on Husband and Wife, 3rd ed. p. 351.

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(1) [1898] 2 Ch. 182.

(2) (1835) 1 Y. & C. Ex. 481, 497.

(3) [1905] 2 K. B. 364.

(4) (1894) 64 L. J. (Q.B.) 236.

(5) [1907] 1 K. B. 116.

(6) (1888) 13 App. Cas. 523.

(7) [1914] W. N. 422; 84 L. J. (Ch.) 517.

(8) [1911] 2 K. B. 705.

(9) [1914] 2 Ch. 617.

(10) (1874) L. R. 18 Eq. 182.

(11) (1877) 7 Ch. D. 398.

(12) 20 Q. B. D. 120.

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Hon. Frank Russell, K.C., and *Stamp*, for the company. By this contract the appellant agreed to pay a particular sum to Mrs. Bond if she became liable to pay it. The nature and effect of an indemnity is to enable the person indemnified to call upon the person giving the indemnity to pay either to himself or directly to the principal creditor, so as to obviate or avoid annoyance to the person indemnified: *In re Richardson* (1); *Carr* v. *Roberts* (2); *Evans* v. *Wood* (3); *Wooldridge* v. *Norris* (4); *Cruse* v. *Paine* (5); *Lacey* v. *Hill* (6); *Brown* v. *Black* (7); *Ashdown* v. *Ingamells* (8); and there is no case and nothing in law showing that a right of that nature is not assignable. If a contract of indemnity is to discharge a liability of A., it is for the benefit of A. and is an asset which he can assign, for whatever is done it all results to the benefit of A., and is assignable just as much as any other property.

[Lord Cozens-Hardy M.R. You can get specific performance of it.]

Yes, and if it is a contract of which specific performance can be obtained it is assignable: *Torkington* v. *Magee.* (9)

Apart from the Judicature Act, the chief objection to the assignment of a contract was that of champerty and maintenance. This is either a legal or equitable chose in action, and if not assignable there must be some obstacle to the assignment. There are two kinds of contract which are not assignable—namely, those which are in their nature not assignable either in bankruptcy or otherwise, such as contracts of personal service, and it cannot be suggested that a contract of indemnity is of that kind, and also those to the assignment of which there are legal objections, such as champerty and maintenance. In *In re Perkins* (10) both the Court below and the Court of Appeal thought that the assignment of a contract of indemnity, being by the trustee in bankruptcy, was not open to the objections which otherwise might arise to such an assignment. In *Seear* v. *Lawson* (11) Sir George Jessel M.R. thought that a chose in action could be assigned in any case, but that certainly the trustee

(1) [1911] 2 K. B. 705, 716.
(2) (1833) 5 B. & Ad. 78.
(3) (1867) L. R. 5 Eq. 9, 15.
(4) (1868) L. R. 6 Eq. 410.
(5) (1869) L. R. 4 Ch. 441, 444.
(6) L. R. 18 Eq. 182, 191.
(7) (1873) L. R. 8 Ch. 939.
(8) (1880) 5 Ex. D. 280.
(9) [1902] 2 K. B. 427; [1903] 1 K. B. 644.
(10) [1898] 2 Ch. 182.
(11) (1880) 15 Ch. D. 426.

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in bankruptcy could assign it. In *Guy* v. *Churchill* (1) it was held that the assignment of the subject-matter of an action by the plaintiff's trustee in bankruptcy to one of the creditors was not champertous, and it is clear from *Castellan* v. *Hobson* (2) that James V.-C. would not have entertained the notion that a contract of indemnity was not assignable to the principal creditor. There can be no objection on the ground of champerty in this case, as the assignment was to the principal creditor, and there is no difference in principle between the case of a married woman with no separate property and that of a bankrupt, and *In re Perkins* (3) covers this case. The only difference between that case and this is that there the assignment was by the trustee in bankruptcy and here it was not, but so long as the assignment does not involve champerty or maintenance the bankruptcy makes no difference.

In *Rendall* v. *Morphew* (4) the estate had been completely wound up, and therefore Eve J. held there was no liability, and that the executors if sued would have had a complete defence to the action.

The fact that Mrs. Bond was a married woman makes no difference in the rights of the parties; she had in fact no other separate property except articles of clothing and trinkets; but as soon as she acquires any, as she may do if she becomes a widow or a legatee, the judgment is a proprietary judgment and will attach. Her case is not different from a case in bankruptcy. The same principle equally applies in both, and the plaintiffs are entitled to recover the full amount of the unpaid calls.

Dighton Pollock in reply. What has been assigned here is a mere right to bring an action, and not a debt which would give the right to enforce payment. There has been no breach of the contract to indemnify, and the plaintiffs are really endeavouring to turn a contract of indemnity into a contract of guarantee. If what has been assigned is not a mere right to litigate, then I submit the indemnity was merely a personal contract and as such not assignable. The principle of *In re Perkins* (3) was extended to liquidation by Neville J. in *Godson's Claim* (5), but has no application to this case. In the case of leases there is no reported instance of the assignment of the benefit of a covenant of indemnity.

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(1) (1888) 40 Ch. D. 481.

(2) (1870) L. R. 10 Eq. 47.

(3) [1898] 2 Ch. 182.

(4) [1914] W. N. 422; 84 L. J. (Ch.) 517.

(5) [1915] 1 Ch. 340.

Mrs. Bond has always been free from any liability. She could not recover anything against the defendant because she has suffered no loss: *Castellain* v. *Preston.* (1) Her position is not analogous to that of a bankrupt; but *Rendall* v. *Morphew* (2) is exactly analogous to this case. There were no assets there and there are none here. This is not a guarantee, but an indemnity, and the most the defendant ought to be ordered to do is to set aside a fund to meet any future liability. That would be carrying out the matter equitably for all parties, and would be satisfying it by payment or otherwise as the occasion might require: *Wright* v. *Simpson.* (3)

If a contract of indemnity is assignable at all, it must be assignable generally and not merely to the principal creditor, and that result is unthinkable.

Cur. adv. vult.

July 17. LORD COZENS-HARDY M.R. I have read and agree with the judgments about to be delivered.

PICKFORD L.J. This action is concerned with the affairs of the plaintiff company, which is in liquidation, and is a claim by the liquidator as assignee of an agreement of indemnity given by the defendant to a Mrs. Bond, who was at one time a shareholder in the company. The facts may be shortly stated as follows: [After stating the facts and dealing with and determining the minor defences in favour of the plaintiffs, his Lordship continued :] This leaves the two larger questions to be decided, and I think they are covered by authority. They are, first, that the contract of indemnity is not assignable; secondly, that it is only a contract to indemnify Mrs. Bond against actual loss, and, therefore, as the judgment is only against her separate property, and she has none, and has paid and can pay nothing, there is no liability.

It has been stated in several cases that at common law an indemnity is confined to protecting the indemnified against actual loss and not against liability, for example, *In re Perkins* (4), though

(1) (1883) 11 Q. B. D. 380.

(2) [1914] W. N. 422; 84 L. J. (Ch.) 517.

(3) (1802) 6 Ves. 714, 734.

(4) [1898] 2 Ch. 182.

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this was doubted by Scrutton J. in *In re Law Guarantee Trust and Accident Society* (1) on the authority of *Ashdown* v. *Ingamells.* (2) However this may be, the indemnity is not so confined in equity (see *Lacey* v. *Hill* (3) and the two cases above mentioned), and in equity the indemnified may call upon the indemnifier to pay the debt either to him or to the principal creditor before having paid himself, and if paid to him the indemnifier has no concern with what he does with the money. It was also decided in *In re Law Guarantee Trust and Accident Society* (1) and *In re Perkins* (4) that in the case of bankruptcy or liquidation of the indemnified the indemnifier must pay the full amount of the liability, and not only the amount of the dividend which can be paid by his estate. But it was argued on behalf of the defendant that this principle does not extend to the case of a married woman with no separate property, as there is against her no personal judgment, but only a judgment against her separate property, of which she has none. It was decided by this Court in *British Dominions General Insurance Co.* v. *Duder* (5) that the indemnifier by means of a policy of re-insurance was in that case only liable to pay to the re-insured the percentage of loss for which he had compromised the claim of the original assured. But in that case there was no liability of the original insurer until the compromise was made. The insurance was against total or constructive total loss only, and the original insurer denied that any such loss had taken place. An action was brought by the assured against him to establish such a loss, but it never was established as between them, because the action was settled for an amount of 66 per cent. It is true that afterwards in an action between the re-insured and the re-insurer a constructive total loss was proved, but this did not give the original assured any further claim against the re-insured, and his liability was never established at more than the 66 per cent. The case was therefore different from that of bankruptcy or liquidation, where the liability exists at any rate until discharge, although by reason of the law which requires an equal distribution amongst the creditors it cannot be satisfied in full unless assets sufficient fall in. I think it was upon the same principle that Eve J. decided

(1) [1914] 2 Ch. 617.

(2) 5 Ex. D. 280.

(3) L. R. 18 Eq. 182.

(4) [1898] 2 Ch. 182.

(5) [1915][2 K. B. 394.

the case of *Rendall* v. *Morphew* (1), as he considered that the executors of the indemnified in that case, who had fully administered the estate, had a defence to any claim by the principal creditor and were under no liability. He was not asked to consider the possibility of a judgment being obtained against assets quando acciderint, and in the circumstances of that case such a possibility was probably of no importance. I think a married woman with a judgment against her in respect of her separate property is in a position analogous to that which arises in the case of bankruptcy or liquidation, and not in a case like that of *British Dominions General Insurance Co.* v. *Duder* (2), although she has at the time no separate property. The liability is still there and may be enforced against future separate property if any should fall in, and I think she is entitled to be relieved of that liability. I do not think it necessary to consider what would have been the case before the passing of the last Married Women's Property Act.

It was argued, though faintly, that there was evidence in this case that Mrs. Bond had separate property as she took in lodgers or paying guests, but I think the evidence altogether failed to show that she was carrying on any business apart from her husband, or that the money received from these lodgers constituted separate property.

The only question remaining is whether this contract was assignable. It is a question really of practical importance only as to the principal creditor, for an assignment to any one else is so improbable as to be almost negligible. But still in principle the question is as to a power to assign generally. I think this is really covered by the decision in *In re Perkins.* (3) The ground on which the contract of indemnity is said not to be assignable is that it is a personal contract which cannot be assigned to or enforced by any one but the indemnified. But in *In re Perkins* (3) such a contract was held to be part of the property of the bankrupt and to vest in the trustee and to be assignable by him. Personal contracts of the bankrupt are not, as a rule, property of the bankrupt which vest in the trustee, and I agree with the argument of the junior counsel for the plaintiffs that the power to assign given to the trustee by the bankruptcy does not extend to make assignable in his hands contracts which in their nature were not assignable by the bankrupt, though it may remove such objections as might arise from the doctrines of champerty and maintenance.

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(1) [1914] W. N. 422; 84 L. J. (Ch.) 517; 112 L. T. 285.

(2) [1915] 2 K. B. 394.

(3) [1898] 2 Ch. 182.

I think, therefore, a decision that the contract of indemnity is assignable by the trustee involves a decision that it is in its nature assignable by the bankrupt. The result of these cases goes very far because they seem to me to establish that, in effect, in the case of an insolvent debtor a contract to indemnify him has the same result as a guarantee to the principal creditor of payment of the debt, but I think this is their effect.

In my opinion the appeal must be dismissed.

Warrington L.J. One Jane Bond, a married woman, was formerly the registered holder of 840 shares in the plaintiff company of 1*l.* each with 15*s.* unpaid. In November, 1910, in pursuance of certain arrangements which are somewhat obscure, she executed a transfer of the shares in favour of the defendant. He requested her to substitute for his name the name of one Bill as transferee, offering, if she would do so, to indemnify her against all liability in respect of the shares. She consented, and Bill's name was inserted in the register as owner in the place of Jane Bond. Bill was in fact an infant, known to be so by the defendant, but not by Jane Bond. The plaintiff company having gone into liquidation, the liquidator inserted the name of Jane Bond in the list of contributories in place of Bill, and on July 6, 1914, he recovered judgment against her for the amount of the unpaid calls and interest thereon. The judgment was for 683*l.* 9*s.* 3*d.* and costs 5*l.* 6*s.* to be payable out of the separate property of Jane Bond which she was then or might thereafter be possessed of or entitled to and any property which she might thereafter while discovert be possessed of or entitled to, and not otherwise. By a deed dated February 8, 1915, Jane Bond assigned to the plaintiff company the benefit of the letter therein mentioned (being in fact the document in which the defendant's contract of indemnity was contained) and of the agreement by the defendant therein contained, and all moneys that might then be or thereafter become payable by the defendant pursuant to the said letter and agreement and the benefit of all other rights of indemnity (if any) that the said Jane Bond might have against the defendant in relation to the said shares or to the said judgment, and the company thereby covenanted with the said Jane Bond that they would not at any time thereafter take any step to enforce the said judgment or make any claim against the said Jane Bond in respect of the said judgment debt or in respect of the said shares or any of them except to the extent of the moneys recoverable from the defendant by virtue of the agreement of indemnity and other rights thereby assigned to the company. Notice of this assignment was given to the defendant, and on March 15, 1915, the plaintiffs commenced this action against the defendant to recover the amount of the judgment, subsequent interest thereon, and subsequent interest on the calls comprised therein. On April 19, 1916, Astbury J. pronounced judgment in favour of the plaintiffs for 630*l.*, being the amount of the unpaid calls of 15*s.* per share on the 840 shares, and the costs of the action. The defendant appealed. His main contention is that a contract of indemnity is not assignable, and the action therefore could not be maintained. He contends, further, that, even if the contract be assignable, inasmuch as Jane Bond was and is a married woman possessed of no separate estate she could not be compelled to discharge her debt, and could recover nothing under the indemnity, and her assignees are in the same position.

There are two minor defences raised which I will refer to presently.

The defendant's argument on his main contention is that a contract of indemnity is for the personal protection of the party to be indemnified and is therefore like other personal contracts not capable of assignment either in equity before the Judicature Act, 1873, or under that Act. I think this argument is disposed of by the decision of the Court of Appeal in *In re Perkins*. (1) In that case the plaintiff Poyser was the original lessee under a lease dated October 5, 1891. In 1893 he assigned the lease to one Plaistowe, and in 1895 Plaistowe assigned to Perkins. Each assignment contained a covenant by the assignee to pay the rent reserved by and observe the covenants contained in the lease and to indemnify the assignor against all claims and liabilities in respect thereof. Plaistowe became bankrupt, Perkins was dead; the lessor called upon the plaintiff to pay, and he did pay, certain accrued rent and insurance premiums. The plaintiff proved in the bankruptcy of

(1) [1898] 2 Ch. 182.

Plaistowe for the amount so paid and the estimated amount of his future liability. This proof was compromised, and as a term of such compromise the trustee assigned to the plaintiff Plaistowe's right to be indemnified by Perkins. The plaintiff then sued the executors of Perkins and was held entitled to recover the amount paid by him to the lessor and to have liberty to apply in respect of any future liability. It was said by North J. and by the Court of Appeal that the right to be indemnified was property of the bankrupt vesting in his trustee and capable of being assigned by him like any other item of the bankrupt's property. But if the contract of indemnity be a merely personal contract, it would in my opinion be impossible to hold that it formed part of the property of the bankrupt. It seems to me, therefore, that this decision, though founded to some extent on the provisions of the Bankruptcy Act, 1883, amounts to a decision that a contract of indemnity is not to be treated as a merely personal covenant not capable of assignment.

There remains, however, the question, What can the assignee recover? Can he recover only the amount, if any, which has been actually paid by his assignor, or can he compel the indemnifier to pay and discharge the liability of the assignor? In the present case and in *In re Perkins* (1) the assignee is the original creditor, and if he is as assignee entitled to call upon the indemnifier to discharge the liability of the indemnified, it results indirectly in his obtaining payment of his debt by the indemnifier. Again I think *In re Perkins* (1) answers the question. Plaistowe was liable to pay the plaintiff a certain sum of money, namely, the sum which the plaintiff had paid to the lessor; Perkins had agreed to indemnify Plaistowe against that liability, Plaistowe assigns the indemnity to the plaintiff, and it is held that Perkins must pay to the plaintiff the sum for which Plaistowe was liable, though the latter had himself paid nothing in respect of that liability. Moreover, I think this decision follows logically on the manner in which Courts of Equity had given effect to contracts of indemnity. In many cases they had ordered the indemnifier to pay the debt against which the indemnity had been given though nothing had been paid by the person indemnified. *Cruse* v. *Paine* (2) is an example. Money has even been ordered to

(1) [1898] 2 Ch. 182.

(2) L. R. 4 Ch. 441.

be paid by the indemnifier to the indemnified himself in respect of moneys for which he was liable but which he had not paid. *Evans* v. *Wood* (1) is an example and shows that Sir George Jessel M.R. was not mistaken in saying, as he did in *Lacey* v. *Hill* (2), that "if the creditor is not a party, I believe that it has been decided that the party seeking indemnity may be entitled to have the money paid over to him." The more recent cases of *In re Richardson* (3) and *In re Law Guarantee Trust and Accident Society* (4) are in accordance with this view.

It seems to me, therefore, that Mrs. Bond—leaving out of consideration the point raised as to her status as a married woman—was entitled to have the amount of the calls paid by the defendant to the plaintiff company or to herself, and that this right was capable of assignment, and that the plaintiffs as assignees were entitled to have it enforced by an order directing payment to themselves.

But then it is said Jane Bond is a married woman with no separate estate, and therefore not in a position to be called upon to pay anything, and there is therefore no right to an indemnity capable of being enforced. In the first place the facts on which this contention rests do not exist. Although Mrs. Bond is not now possessed of separate estate she may hereafter become possessed of property, and, if she does, that property would be liable for the discharge of the judgment; so also if she were to become a widow any property she might then possess could be resorted to; but I think the real answer to the contention is that the measure of the liability of the indemnifier is not the capacity of the indemnified to pay, but his liability to pay. To adapt the words of Sir George Jessel M.R. in *Lacey* v. *Hill* (2), the indemnifier is certainly liable in equity to indemnify, and liable to indemnify to the extent of the liability incurred by the indemnified. I think the same principle is exemplified by *In re Perkins* (5) and by *In re Richardson.* (3) In my opinion, therefore, this contention fails, and the defendant was properly held liable for the whole amount of the calls.

[His Lordship then dealt with and determined in favour of the plaintiffs the two minor defences to which he had already alluded, and which are not material to be stated for the purposes of this report, and continued :] On the whole I am of opinion that the appeal fails and ought to be dismissed.

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(1) L. R. 5 Eq. 9.

(2) L. R. 18 Eq. 182, 191.

(3) [1911] 2 K. B. 705.

(4) [1914] 2 Ch. 617.

(5) [1898] 2 Ch. 182.

Solicitors: *Nordon & Drury; Foss, Bilbrough, Plaskitt & Co.*

R. M.

PETERSON J.
1916
July 5, 6, 21.

In re HALL.
HALL *v.* HALL.

[1914 H. 2312.]

Settled Land—Tenant for Life—Demised Mines falling into Settlement—Rents and Royalties—Settled Land Act, 1882 (45 *&* 46 *Vict. c.* 38), *s.* 11.

Sect. 11 of the Settled Land Act, 1882, governs the distribution, as between the limited owner and the remaindermen under a settlement, of the rents and royalties derived from mining leases granted under the powers of the Act by the person having the limited interest under such settlement, but it does not affect the rights of the limited owner and remaindermen under a subsequent settlement to which mines already demised have become subject, and in such a case those rights are governed either by the provisions of the settlement or by the law relating to open mines.

The plaintiff was entitled under his marriage settlement, made in 1886, during his life, to the rents, until sale, of one undivided third part, thereby settled, of certain mines devised and settled by the will of his father. In 1895 and 1902 he joined with the tenant for life of one other third part and the owner in fee of the remaining third part in granting leases of the mines. Subsequently one half of one of the other third shares devolved upon the plaintiff subject to the leases, and being caught by the terms of the conveyance in his marriage settlement became subject to it:—

Held, that the plaintiff was entitled, during his life or until sale, to receive the whole of the rents and profits derived from the one sixth share in question during the continuance of the leases.

Adjourned Summons.

The following statement of facts is taken from his Lordship's considered judgment:—"In this case the question is whether the plaintiff, Arthur Hepworth Hall, is entitled to receive the whole or three fourths or one fourth of the rents and royalties payable in respect of one half of one third of the minerals demised by two leases of 1895 and 1902.

"In the year 1871 the Rev. Thomas Hepworth Hall, who was the owner of the mines in question, died having made a will by which he devised all his real estate and bequeathed the residue of his personal estate to trustees upon trust for sale and conversion and investment of the proceeds, and the trustees were directed to hold the proceeds of realization and the investments on trust to pay the income to his widow, Elizabeth Hall, for life, and then to hold the corpus for his children who being sons attained twenty-one or being daughters attained that age or married in equal shares.

"The testator's widow and three children survived him and all the children attained the age of twenty-one. In 1885 the widow, in exercise of the powers conferred by the Settled Land Act, 1882, leased the Haigh Moor seam of coal under lands containing 30 a. 2 r. and 32 p., part of the testator's realty, to John Shaw for thirty years.

"In the year 1886 the plaintiff, one of the testator's three children, married, and prior to his marriage he executed a settlement which consisted of two deeds, both dated June 15, 1886. By one of those deeds he conveyed to trustees his one third share of the real estate devised by his father's will, subject to his mother's life estate, and all other the share or shares in such real estate to which he by reason of the intestacy of his brother or sister or by virtue of his or her will might become entitled upon trust for sale, but during the joint lives of his mother, his wife, and himself, or the lives or life of the survivors or survivor of them with their, his, or her consent in writing, with power to postpone realization and with power to the trustees to lease or concur in leasing the premises for any term not exceeeding twenty-one years, and until sale the rents received were to be paid or applied as if they were income derived from the investment of the proceeds of sale.

"By the other deed of June 15, 1886, the plaintiff, after reciting that it had been agreed that all the shares to which he was or might become entitled in the real and residuary personal estate of his father should be settled, assigned to the trustees his one third share, subject to his mother's life interest, in his father's residuary personal estate, and in the proceeds of sale of his father's real estate if sold under the trusts of his father's will, and all other the share or shares to which he might become entitled in such personal estate and proceeds of sale of real estate by reason of the death intestate of his brother or sister or under his or her will or otherwise howsoever, upon trust to stand possessed thereof and of the clear proceeds of the sale of the shares and hereditaments comprised in the first deed of June 15, 1886, as and when they should fall into possession, upon trust to retain or (during the lives of the plaintiff and his wife or the life of the survivor with their, his, or her consent) to sell the same. Under the trusts of this deed the plaintiff is entitled to the interest, rents, profits, and annual income for life.

"On April 22, 1887, a settlement was executed on the marriage of Miss Frances Mary Hall, a daughter of the testator, with the Rev. F. Neville by which her one third share of the testator's estate was settled upon trust, in the events which have happened, after the deaths of Mr. and Mrs. Neville, both of whom died in 1910, for the plaintiff and his brother Percy Craven Hall. Under this settlement the trustees had power to grant mining leases for terms not exceeding sixty years, and all rents and royalties derived from leasing any mines were to be deemed income and to be applicable as income.

"In 1891 the testator's widow died.

"In 1895 Percy Craven Hall, who was absolutely entitled to one third of the testator's estate, Mrs. Neville, who was tenant for life of another one third, the plaintiff, who was the tenant for life of the remaining one third, and the trustees of the testator's will leased to John Shaw the Haigh Moor coal seam under some sixty-two acres for a term of thirty-three years; and on May 14, 1902, a similar lease (in which the trustees of the settlements made by the plaintiff and Mrs. Neville joined) was granted to Lord Masham of the coal under the land therein specified, except the coal comprised in the two leases to Mr. Shaw, for a term of sixty years."

All these leases were granted by Mrs. Neville and the plaintiff as tenants for life, acting under the powers of the Settled Land Acts, and after application to the Court under s. 63 of the Settled Land Act, 1882.

The present summons related to the one half of Mrs. Neville's one third share of the demised mines which, under the trusts of her settlement, devolved in 1910 upon the plaintiff, who did not contend that it was not caught by his own marriage settlement.

Hughes, K.C., and *A. B. Nutter*, for the plaintiff. No capitalization is necessary in this case, as the share in question came to the plaintiff subject to an existing lease with open mines, and he is entitled to the rents as absolute owner.

When mines are open at the date of a settlement, the tenant for life is in the same position as if he was made tenant for life sans waste. The result of *In re Kemeys-Tynte* (1), *Earl of Lonsdale* v. *Lowther* (2), and *In re Chaytor* (3) is that when mines are open and leased at the date of the settlement, then, so far as the tenant for life is concerned, he is not impeachable for waste and is entitled to the whole of the mining rents. They are part of the income of the property.

Sect. 11 of the Settled Land Act, 1882, only applies to a lease granted under the powers of the Act with relation to the particular settlement conferring the power.

The plaintiff is in the same position as if he had come into this share in 1910 and had then settled it subject to the lease. But if that is not so, and he, being unimpeachable for waste, must be regarded as having granted a lease under s. 11, then under the provisions of that section he is entitled to three fourth parts of the rents.

H. J. H. Mackay, for defendant trustees of will and settlement. Under the will of the testator, Thomas Hall, who died in 1871, there is no power of leasing or management at all.

H. M. Humphry, for the defendant Grose (the assignee of the plaintiff's life interest), and *Mackay*, for the defendant Sedding (another assignee), supported the application.

W. A. Peck, for the defendant Reversionary Interest Society, the mortgagees of reversioners. The plaintiff is not entitled to the whole of the rents in question. The settlement created by the will was at an end in 1891 because the property had come home again. This property was really converted by the testator's will, and it devolved upon the beneficiaries as personal estate. No mining lease

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(1) [1892] 2 Ch. 211.
(2) [1900] 2 Ch. 687.
3) [1900] 2 Ch. 804.

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could have been granted under the will, and for the grant of the leases in question application had to be made to the Court under s. 63 of the Settled Land Act, 1882, and the plaintiff must be treated as having granted the leases under s. 11.

The plaintiff is impeachable for waste within the meaning of s. 11 and three fourth parts of the rents ought to be capitalized: *In re Ridge.* (1) There is, moreover, no contrary intention in the plaintiff's marriage settlement within the meaning of s. 11: *In re Daniels.* (2)

A power to lease lands is not a power to grant mining leases. There was no power to grant mining leases under the will, and there was no intention that this tenant for life should have anything more than the rents under leases that could be granted. In the circumstances I submit that three fourth parts of the rents should be set aside under s. 11.

Hughes, K.C., in reply. Regard must be had to the position when the plaintiff came into possession of the property. The mines were then open mines and he would not be impeachable for waste and could work them. A tenant for life may work mines although opened subsequently to the settlement: *Clavering* v. *Clavering* (3), referred to as an authority in *In re Maynard's Settled Estate* (4) and *Greville-Nugent* v. *Mackenzie.* (5)

Cur. adv. vult.

July 21. PETERSON J. stated the facts as above set out and continued: It is not contended on behalf of the plaintiff that the one half of one third of his father's estate to which he became entitled under Mrs. Neville's settlement is not caught by his marriage settlement. The question is whether he is in these circumstances entitled to receive the whole or three fourths or one fourth of the rents and royalties derived under the mineral leases to which I have referred from the one half of Mrs. Neville's one third which accrued to his settlement on the death of Mr. and Mrs. Neville in 1910 without issue.

Apart from any statutory provisions a tenant for life who is expressed to be unimpeachable for waste can open and work mines and receive all the profits arising therefrom. If he is impeachable for waste he cannot open mines; but if the mines in question have been opened before the settlement (*Dashwood* v. *Magniac* (1); *In re Ridge* (2)) or have been opened by a person interested under the settlement and entitled to open mines, e.g., a tenant in tail (*Clavering* v. *Clavering* (3)), a tenant for life can continue to work the mines and receive all the profits derived therefrom.

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(1) (1885) 31 Ch. D. 504.
(2) [1912] 2 Ch. 90.
(3) (1726) 2 P. Wms. 388.
(4) [1899] 2 Ch. 347.
(5) [1900] A. C. 83.

So, too, where the owner of an estate has contracted to lease mines and dies before the grant of the lease or the opening of the mines, the tenant for life under his will is entitled to receive the rents and royalties payable under the lease: *In re Kemeys-Tynte.* (4) If a tenant for life utilizes his power of leasing mines granted by the Settled Land Acts, part of the rents and royalties derived from the lease must, unless the settlement provides otherwise, be set aside as capital. Where the tenant for life is impeachable for waste and the mines are not open, the portion of the rents and royalties which must be appropriated as capital is three fourths, but where the tenant for life is unimpeachable for waste, or where he is impeachable for waste but the mines are open, the portion to be set aside is one fourth: s. 11 of the Settled Land Act, 1882; *In re Chaytor* (5); and this rule also applies in the case where the settlement contains a trust for sale and the lease is granted under the joint operation of ss. 11 and 63 of the statute: *In re Ridge.* (2)

The provisions of s. 11 of the Settled Land Act, 1882, are a condition imposed upon the exercise by the tenant for life of the privilege conferred upon him by the Act. The Act in effect provides that, if the powers of leasing which are granted by the Act are used, only a portion of the rents and royalties which result from recourse to the Act is to be treated as income. It regulates the division, as between those who are interested in corpus and those who have limited interests under the settlement, of the rents and royalties arising from mining leases granted by persons having limited interests under the settlement by virtue of the powers conferred by the Act.

Sect. 11 does not govern the distribution of rents and royalties derived from leases which are not granted under the powers created by the Act. It does not, for instance, relate to a lease granted by an owner of the property before the execution of the settlement, or by a person interested under the settlement, who creates the lease under special powers contained in the settlement. While it governs the distribution of the proceeds of a lease granted by a limited owner under a settlement as between the persons interested under that settlement, it does not affect the rights of persons interested in a subsequent settlement to which the property which is comprised in the lease has become subject. In such a case the rights of the tenant for life and the remaindermen under the subsequent settlement are governed by the provisions of the settlement or by the provisions of the law relating to open mines.

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(1) [1891] 3 Ch. 306, 360.
(2) 31 Ch. D. 504, 508.
(3) 2 P. Wms. 388.
(4) [1892] 2 Ch. 211.
(5) [1900] 2 Ch. 804.

Applying these observations to the present case, the leases in question, so far as they relate to the one half of Mrs. Neville's one third, which became subject to the plaintiff's settlement, were not made by any person interested under that settlement, and consequently, in my view, s. 11 of the Act does not govern the distribution of the proceeds of the leases among the persons interested under that settlement.

The question then is whether, s. 11 being out of the way, the plaintiff, as tenant for life, is entitled to all or some of the rents derived from the leases of the portion of Mrs. Neville's one third which now forms part of the property which is subject to his settlement. When this interest fell into the plaintiff's settlement the mines had already been opened under the lease which had been granted; and, as under the plaintiff's settlement he is entitled to the rents of the property comprised therein until sale, he is, in my opinion, entitled to receive the whole of the rents and royalties derived from a moiety of Mrs. Neville's one third of those open mines during the continuance of the leases.

Solicitors: *W. H. Hales; Sidney Smith, Son & Leefe; Radcliffes & Hood.*

R. M.

PETERSON J.

1916

July 20, 21.

In re BULCOCK.

INGHAM *v.* INGHAM.

[MANCHESTER DISTRICT REGISTRY.]

[1913 B. 1989.]

Will—Construction—" Nearest of kin of myself "—Artificial Future Class —Bearing Testator's Surname and being Male.

Under the testator's will certain devised estates became limited on the death of the surviving tenant for life " to the use of the nearest of kin of myself who shall then be living and who shall be a male bearing the name of Bulcock his heirs and assigns for ever provided nevertheless that such person shall not claim through or under my late brother Ambrose Bulcock."

At the testator's death all of his next of kin according to the statute were disqualified under the terms of the limitation either by sex, name, or descent from Ambrose.

At the death of the surviving tenant for life there were blood relations of the testator alive who were all named Bulcock, being grandsons of paternal uncles of the testator :—

Held, that the testator had created an artificial class of kin which was to consist of persons living at the death of the surviving tenant for life, who were related to the testator, were male, bore the name of Bulcock, and were not descendants of Ambrose, and that of the persons so ascertained those who were nearest in blood to the testator were entitled under the limitation.

ADJOURNED SUMMONS.

The testator, Thomas Bulcock, devised his Rimington estate and his Pendleton estate unto his trustees, their heirs and assigns, as to his Rimington estate in trust for the use and benefit of his nephew William Thomas Ingham during his life or until he should do or suffer certain acts of forfeiture therein mentioned and subject thereto in trust for the use and benefit of the first and other sons successively of the said William Thomas Ingham in tail male, and in default of such issue to the use of the testator's nephew Benjamin Ingham for life subject to the same conditions and restrictions as in the previous life estate and subject as aforesaid to the use of the first and other sons successively of Benjamin Ingham in tail male, " with remainder to the use of the nearest of kin of myself who shall then be living and who shall be a male bearing the surname of

'Bulcock' his heirs and assigns for ever Provided nevertheless that such person shall not claim through or under my late brother Ambrose Bulcock or his issue it being my wish that no portion of my property shall at any time come into the possession of any of the issue of my said brother under this my will." And as to his Pendleton estate the testator directed that it should be held on similar trusts for his nephew Benjamin Ingham for life with remainder to his first and other sons in tail male, with remainder to his nephew William Thomas Ingham for life with remainder to his first and other sons in tail male, with a like ultimate remainder as in the case of the Rimington estate. The testator devised and bequeathed all his real and personal estate not otherwise disposed of to his said two nephews absolutely.

The testator died on May 24, 1878. William Thomas Ingham died on November 1, 1897, and Benjamin Ingham died on December 2, 1911, neither of them having had male issue.

Upon an application by the residuary legatees inquiries were directed, and on June 5, 1916, the Master made his certificate, in schedule 1 whereof appeared the names of the nearest of kin to the testator at the time of his death, comprising a sister of the testator, a niece (daughter of Ambrose Bulcock), two nephews (sons of Ambrose Bulcock), and the two tenants for life, but at the death of the surviving tenant for life all the others were already dead. The second schedule contained the names of the two sons of Ambrose Bulcock above mentioned. The third schedule contained the names of blood relations at the testator's death all of whom predeceased the surviving tenant for life. The fourth schedule contained the names of the testator's blood relations alive at the death of the surviving tenant for life, and all named Bulcock, being grandsons of paternal uncles of the testator. The fifth schedule contained the names of further blood relations of the testator, all named Bulcock and alive at the death of the surviving tenant for life, brothers of some of the persons appearing in the fourth schedule, but proof of whose claims had been postponed pending the decision of the Court on the construction of the will.

Roby, for the applicants. The gift over is bad. To come within the class four conditions must be fulfilled, namely, each member must be nearest of kin, male, Bulcock by name, and not descended from Ambrose. "It seems never to have been decided whether in case an additional term of description be annexed to a gift to next of kin, as if property be given to next of kin of a particular name, and the true next of kin do not bear that name, the nearest relations who do bear it can take under the will": Jarman on Wills, 6th ed. p. 1609. The question was discussed but not decided in *Doe* v. *Plumptre* (1), cited in *Carpenter* v. *Bott.* (2)

In the case of a gift to "next of kin," "my nearest relations," or any gift of that kind, prima facie the class is to be ascertained at the death of the testator: per Parker J. in *In re Winn.* (3) The words "who shall then be living" in this will create just such an insuperable difficulty as did the word "living" in that case against ascertaining the class at any time other than at the testator's death. If the class is to be ascertained at the testator's death, as I submit it must be, then it is clear that no one of the testator's next of kin or nearest blood relations qualified to take was living at the death of Benjamin Ingham, and none of the persons in the fourth or fifth schedule to the certificate can claim.

It is impossible to take the view that a composite class has to be ascertained having the qualifications specified. Such a gift would be void for uncertainty, because the testator has said "nearest of kin of myself," and "nearest" means only one, and he has not given any indication who that person is. None of the persons in the third schedule became entitled, because, though living at the death of the testator, none was living at the death of the surviving tenant for life.

The result is that the plaintiffs representing the residuary legatees are entitled.

H. W. Carlton (for *J. H. Whitworth*, serving with His Majesty's Forces), for the defendant residuary legatee. I adopt the arguments urged on behalf of the plaintiffs.

C. E. R. Abbott, for Richard Bulcock, the eldest of the persons named in the fourth schedule. The will, by using the words "nearest," "a male," and "his heirs and assigns," clearly indicates a single person, and Richard Bulcock, as being the nearest, i.e. the eldest, in birth, is entitled. An artificial class is created of persons alive at the death of the surviving tenant for life. *In re Winn* (1) is distinguishable because in the present case the testator uses the singular number. His intention was to benefit a certain member of a class to be ascertained at a distant date. The use of the singular number coupled with the proviso excluding the issue of Ambrose shows that the testator meant that his nearest of kin was to be a definite person at a definite date, i.e., the death of Benjamin Ingham: *In re Mellish.* (2)

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(1) (1820) 3 B. & Al. 474.

(2) (1847) 15 Sim. 606, 609.

(3) [1910] 1 Ch. 278, 286.

"Nearest" means first in birth. In *Power* v. *Quealy* (3) the Court of Appeal in Ireland, affirming the decision of the Court of Queen's Bench, held that under a devise to "the nearest and most deserving male cousin and a regular Power of the family" the eldest male cousin was entitled. Applying the reasoning of the Irish Courts to this case, Richard Bulcock, the eldest of the qualified class, is alone entitled.

If not solely entitled, at any rate he takes a share as a member of the class.

J. M. Gover, for Matthew Bulcock, another person named in the fourth schedule. The fallacy in the argument for the plaintiffs is in reading "nearest of kin of myself" as "next of kin." If next of kin is taken as the meaning, then the class must be ascertained at the death of the testator; but that is not what the will says. This is a gift to the nearest of a certain larger class of persons at a certain time, and those persons must be (*a*) kin, (*b*) "then living" (i.e., at the death of Benjamin Ingham), (*c*) male, (*d*) have the surname of Bulcock, and (*e*) not be issue of Ambrose. It is significant that the testator does not use the phrase "next of kin," or "my next of kin," or even "my." "Nearest" is the selective word, and "kin" is the description of the class.

Each case depends upon its own facts, and even where there is a gift to "my next of kin" it does not necessarily follow that it is to be construed always in the same way. It must be construed according to the facts: *In re McFee* (4); *In re Mellish.* (2) The Court will regard the existing state of things known to the testator:

(1) [1910] 1 Ch. 278.

(2) [1916] 1 Ch. 562.

(3) (1878) 2 L. R. Ir. 227; 4 L. R. Ir. 20.

(4) (1910) 103 L. T. 210.

per Lord Atkinson in *Lightfoot* v. *Maybery* (1); and when none of the testator's next of kin, in the strict sense, could qualify under this gift the Court will not construe "nearest of kin of myself" as "my next of kin."

"Nearest" is not used in the singular as necessarily meaning only one person, but means nearest in relationship, whether one or several in the same degree.

J. H. Stamp, for the remaining persons named in the fourth schedule. The cases cited have really no application to this gift. "Nearest of kin of myself" cannot mean "my next of kin" because at the date of his will the testator knew that his only brother was Ambrose and that he could have no true next of kin who could fulfil the necessary qualification. He had no other next of kin at his death besides his brother's children and his Ingham nephews, and to read this gift as meaning "next of kin" in the strict sense would render it wholly inoperative. What the testator meant was "Take those of my kin living at the death of the surviving tenant for life, being male and named Bulcock but not descended from Ambrose, and select the nearest of them." The nearest of the class at the definite future date are to be selected. If "nearest of kin of myself" is construed as "next of kin," then that construction exhausts the superlative and leaves no further selection. The testator intended to create an artificial class of male Bulcocks not descended from Ambrose, and the nearest in blood of that class were to take.

"Nearest of kin of myself" is nomen collectivum and is not restricted by the use of the singular: *Pyot* v. *Pyot* (2), where the gift was "to the nearest relation of the Pyots and to his or her heirs executors administrators or assigns for ever."

Roby in reply. I do not say that "nearest of kin of myself" means "my next of kin according to the statute," but I submit that it means "my nearest blood relations," and that if, having found them out at the death of the testator, all those who are female, descended from Ambrose and not named Bulcock, are eliminated, the persons named in the third schedule are left, all of whom predeceased Benjamin Ingham. The gift is void for uncertainty.

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(1) [1914] A. C. 782, 794.

(2) (1749) 1 Ves. Sen. 335.

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1916
BULCOCK, *In re.*
INGHAM *v.* INGHAM.

PETERSON J. stated the provisions of the will relating to the trusts of the Rimington estate and the Pendleton estate, and continued: Now what has happened is this. Benjamin Ingham, who was the survivor, died in 1911, without any male issue; William Thomas Ingham had died in 1897 without issue. An inquiry was directed with a view to ascertain who were the nearest of kin according to the Statute of Distribution or related in blood to the testator. The Master has found that the nearest of kin of the testator at the time of his death according to the statute were the six persons whose names were set forth in the first schedule to his certificate. The first two, Ellen Bulcock and Ellinor Bulcock, are excluded, both being female, and the latter being also a daughter of Ambrose Bulcock; the third and fourth, Thomas Bulcock the younger and Arthur Ambrose Bulcock, are both excluded because they are sons of Ambrose Bulcock; and the fifth and sixth, William Thomas Ingham and Benjamin Ingham, are excluded because they did not bear the name of Bulcock and did not survive the period of vesting.

The result, therefore, is that of the true next of kin of the testator at the time of his death none of them was then or ever could be capable of taking under the terms of his will, because they were either female, or children of Ambrose Bulcock, or did not bear the name of Bulcock, so that if the words "nearest of kin of myself" are to be read as meaning next of kin of the testator, i.e., the persons who at his death were his next of kin according to the Statutes of Distribution, the ultimate remainder was wholly inoperative because there was no one who, being such next of kin, could comply with the condition of the gift.

Looking at this gift, I do not myself think that there can be much doubt what the testator intended to do, but it is another matter whether he has carried out that intention. The gift is "to the nearest of kin of myself who shall then be living and who shall be a male bearing the surname of Bulcock." Now, if the true construction of the gift be "to my next of kin who shall then be living," the class must be ascertained as at the death of the testator, and then it would be necessary to ascertain who of the class so ascertained survived Benjamin Ingham, and it would only be those persons who, if they fulfilled the other conditions, would be entitled to participate in the benefit under the will. This would be in accordance with the view which Parker J. expressed in *In re Winn* (1), where he says: "Of course, in every case of a gift 'to my next of kin,' or 'my nearest relations,' or any gift of that kind, prima facie the rule is, and I think it is not only a rule of construction, but the natural meaning of the words, that the class is to be ascertained at the death of the testator. When the testator dies, certain people answer the description of his relatives, or his next of kin, or his nearest in blood, or any of those expressions; and it is difficult to see in the present case, if I am right in the construction I put on the words, namely, that he is contemplating a class some of whom may survive, and some of whom may die before a certain period, at what other time the class is to be ascertained than at the date of the testator's death. Thus it appears to me that the most natural construction, apart from authority, and apart from those particular circumstances to which I have already referred, is that this is a gift to the next of kin, to be ascertained at the testator's death, but that any one of the class so ascertained, in order to take under the ultimate gift, has to survive that period." In this case, if the gift had been "to the use of my next of kin who shall then be living," I think that the class would have to be ascertained at the time of the testator's death and that only those members of that class who survived Benjamin Ingham would benefit.

But it is an entirely different matter if by the will the class has to be ascertained at some future time fixed by the testator himself, and the gift is to some members of that future class.

Now what I have here is a gift "to the use of the nearest of kin of myself who shall then be living and who shall be a male bearing the name of Bulcock his heirs and assigns for ever." That may be ambiguous. If the true construction of "the nearest of kin of myself" &c. be "my next of kin who shall then be living," I agree that the effect is that the gift does not operate because the class has to be ascertained at his death and none of the class so ascertained survived Benjamin Ingham. But in my view that is not the true construction. The use is "to the nearest of kin of myself who shall then be living and who shall be a male bearing the surname of Bulcock"; that is to say, you are to take the kin of the testator who shall be living at the death of the surviving tenant for life.

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(1) [1910] 1 Ch. 278, 286.

Of that class of kin the testator wants those who are most nearly related to him to take.

The testator has created an artificial class of kin, which is to consist of persons living at the death of Benjamin Ingham who are related to the testator and are male and bear the surname of Bulcock, excepting his brother Ambrose and his issue; and of these the nearest in blood to the testator are to take. If the gift was construed as a devise to the testator's next of kin who should survive Benjamin Ingham and be male and bear the name of Bulcock and not be Ambrose Bulcock or his issue, there would not be a class of true next of kin, and moreover at the testator's death there was not any one who could fulfil the requisite conditions.

I was referred to *Power* v. *Quealy* (1), in which the Court of Appeal in Ireland appears to have come to the conclusion that a gift to the "nearest and most deserving male cousin and a regular Power of the family" operated in favour of the eldest male cousin, and it was contended that in this case "nearest" means first in birth. In my view, however, the word imports degree of relationship and not order of birth. A second child is as near as a first child.

It seems to me, therefore, that I can give effect to the will of the testator by construing it to mean that at the death of the survivor of the two tenants for life you have to ascertain the persons who are then of kin to, or of the blood of, the testator, and then find out who of those persons, being male and bearing the surname of Bulcock, is nearest in blood to the testator, excluding the issue of Ambrose Bulcock. In my opinion the persons named in the fourth schedule, and also those named in the fifth schedule who prove their claim, are entitled under this ultimate remainder.

Solicitors: *John E. Brown, Bury; Sutton, Elliott & Co., Manchester, for Frederick Howarth & Son, Bury; J. B. Domakin & Co., Manchester; J. W. Carter, Blackburn.*

(1) 2 L. R. Ir. 227; 4 L. R. Ir. 20.

R. M.

In re W. HAGELBERG AKTIEN-GESELLSCHAFT.

[1916 W. 1590.]

YOUNGER J.

1916

Aug. 29; Sept. 5.

Trading with the Enemy—Company incorporated in Germany—Branch Business in England—Order of Board of Trade to wind up Branch Business—Appointment of Controller—Payment of Debts—Whether Creditors of Company entitled to share pari passu with Creditors of Branch Business—Trading with the Enemy Amendment Act, 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 3, 4, *and* 7.

A company of printers and art publishers incorporated in the German Empire and having its principal place of business in Berlin established a branch in London which carried on business there on its behalf for some years before the outbreak of the present war. The principal business of the London branch was to sell to English firms goods printed by the company in Germany and to obtain orders from English firms for printing. The London business had its own capital account and made its own profit, which was the difference between the prices obtained for the goods and those at which they were invoiced by the company in Berlin, any net profits made by the London business, after providing for payment of expenses, being accounted for to the company at Berlin. For the purpose of the London business a banking account was opened with a bank in London, and this account was used rarely, if at all, by the Berlin house. The company had no other business in the United Kingdom. In April, 1916, the London business was ordered to be wound up, and a controller was appointed.

On an application by the controller under the Trading with the Enemy Amendment Act, 1916, for the determination of the question whether the creditors of the company were entitled to share pari passu with the creditors of the London business:—

Held, that the creditors referred to but not specified in sub-s. 3 of s. 1 of the Trading with the Enemy Amendment Act, 1916, were the creditors of the business as mentioned in sub-s. 4 and not the creditors of the company as mentioned in sub-s. 7, and accordingly that the creditors of the enemy company who were not enemies, but whose debts did not arise out of transactions or dealings in relation to the London business, were not entitled to share pari passu with the creditors whose debts had arisen by reason of transactions or dealings in relation to that business in the distribution of any sums or other property resulting from the realization of any assets of that business.

CHAMBER SUMMONS.

This was a summons under the Trading with the Enemy Amendment Act, 1916, taken out by Charles Eves, the controller appointed by an order of the Board of Trade dated April 17, 1916, and made pursuant to s. 1, sub-s. 1 (*b*), of the Act, for the determination of the following questions:—"(1.) Whether creditors of the said W. Hagelberg Aktien-Gesellschaft who are not enemies, but whose debts do not arise out of transactions or dealings in relation to the business carried on in the United Kingdom by the said W. Hagelberg Aktien-Gesellshaft, are entitled to share pari passu with creditors whose debts have arisen by reason of transactions or dealings in relation to the said business in the distribution of any sums or other property resulting from the realization of any assets of the said business," and "(2.) whether the respondents Gottschalk and Davis are creditors entitled to share pari passu as aforesaid in the distribution of any sums or other property resulting from the realization of any assets of the said business."

The summons was heard in chambers by Younger J. on August 29, 1916.

Gore-Browne, K.C., and *W. E. Vernon*, for the applicant.

Austen-Cartmell, for the Board of Trade.

Cunliffe, K.C., and *R. L. Ramsbotham*, for the respondents Gottschalk and Davis.

Cur. adv. vult.

The facts and the material sections of the Trading with the Enemy Amendment Act, 1916, are fully stated in the following judgment of Younger J., which was delivered by him in open Court on September 5, 1916.

YOUNGER J. This summons was heard by me in chambers on Tuesday last, and as it raises a question of general importance under the Trading with the Enemy Amendment Act, 1916, I have been asked to deliver judgment in open Court.

By an order of the Board of Trade dated April 17, 1916, the business carried on in the United Kingdom by W. Hagelberg Aktien-Gesellschaft at 12, Bunhill Row, in the city of London, was ordered to be wound up, and Mr. Charles Eves was appointed controller for the purposes of that winding up.

This application, which in accordance with that order is made with the consent of the Board of Trade, is one by the controller to have it determined by the Court—[his Lordship read the questions asked by the summons, and continued :] The view of the controller is that both of these questions should be answered in the negative, and in that view the Board of Trade by counsel concur. It is, however, opposed by the respondents Gottschalk and Davis.

Now the enemy or enemy subject concerned, W. Hagelberg Aktien-Gesellschaft, is a company of printers and art publishers incorporated in the German Empire and having its principal place of business in Berlin. The business ordered to be wound up is really a branch of the Berlin business established in London and carried on here by or on behalf of the enemy company for some years before the outbreak of the present war. The principal business of the London branch has been to sell to English firms goods printed by the company in Germany, and to obtain orders from English firms for printing. The London business, however, had its own capital account and made its own profit, that is, the difference between the prices obtained for the goods and those at which they were invoiced by the company in Berlin, any net profits made by the London business, after providing for payment of expenses, being accounted for to the company at Berlin. For the purpose of the London business a banking account was opened with the London County and Westminster Bank, Lothbury, and this account, so far as the controller can ascertain, was used rarely if at all by the Berlin house. The company has no other business in the United Kingdom. Of its London business Mr. Eves was appointed supervisor on March 9, 1915, pursuant to s. 12, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, this appointment being superseded by the winding up order, and by his appointment as controller under the Act of 1916.

Now it is only to this London business and its assets that the winding up order applies. The order has, and under the Act in the case of this company can have, no reference to any assets of the company either in England or elsewhere which are not assets of this London business, its only British undertaking. The company, however, has a business in Germany ; it also controls a business in the United States; it may have many commitments in other directions ; and the important question of principle raised by the summons—and I am told it is a question which has arisen or will arise in many similar cases—is whether creditors of the company in respect of its ownership of or responsibility for these other businesses—in short, its creditors on any account other than that of the London business—are entitled to rank for payment of their claims against the assets of that business to which alone the winding up order extends.

Now the Act provides in s. 1, sub-s. 1, " Where it appears to the Board of Trade that the business carried on in the United Kingdom by any person, firm, or company is . . . . carried on wholly or mainly for the benefit of or under the control of enemy subjects, the Board of Trade shall, unless for any special reason it appears to them inexpedient to do so, make an order either—(*a*) prohibiting the person, firm, or company from carrying on the business, except for the purposes and subject to the conditions, if any, specified in the order ; or (*b*) requiring the business to be wound up." Then sub-s. 2 is " Where the Board of Trade make any such order they may at the same time or at any time subsequently appoint a controller to control and supervise the carrying out of the order and, if the case requires, to conduct the winding up of the business, and in any case where it appears expedient to the Board of Trade, the Board may, as occasion requires, confer on the controller such powers as are exercisable by a liquidator in a voluntary winding-up of a company," and so on, with this further provision, which I think is the only one I need refer to at the moment, " and the remuneration of and costs, charges, and expenses incurred by the controller, and any remuneration payable and costs, charges, and expenses incurred in connection with the supervision or inspection of the business, whether before or after the passing of this Act, to such amount as may be approved by the Board, shall be defrayed out of the assets of the business, and shall be charged on such assets in priority to any other charges thereon." Then sub-s. 3, which is the important sub-section, is as follows : " The distribution of any sums or other property resulting from the realisation of any assets of the business, whether those assets are realised as the result of an order requiring the business to be wound up or as the result of an order prohibiting or limiting the carrying on of the business, shall be subject to the same rules as to preferential payments as are applicable to the distribution of the assets of a company which is being wound up, and those assets shall, so far as they are available for discharging unsecured debts, be applied in discharging such debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies; and any balance, after providing for the discharge of liabilities, shall be distributed amongst the persons interested therein in such manner as the Board of Trade may direct: Provided that any sums or other property which had a state of war not existed would have been payable or transferable under this section to enemies, whether as creditors or otherwise, shall be paid or transferred to the custodian under the Trading with the Enemy Amendment Act, 1914, to be dealt with by him in like manner as money paid to him under that Act." Then sub-s. 4 is "Where there are assets of the business in enemy territory, the controller shall cause an estimate to be prepared of the value of those assets and also of the liabilities of the business to creditors, whether secured or unsecured, in enemy territory, and of the claims of persons in enemy territory to participate in the distribution of any balance available for distribution, and such liabilities and claims shall, for the purposes of this section, be deemed to have been satisfied out of such assets so far as they are capable of bearing them, and the balance (if any) of such liabilities and claims shall alone rank for payment out of the other assets of the business." Then sub-s. 7 is "Where an order under this section has been made as respects the business carried on by any person, firm, or company, no bankruptcy petition or petition for sequestration or summary sequestration against such person or firm, or petition for the winding up of such company, shall be presented, or resolution for the winding up of such company passed, or steps for the enforcement of the rights of any creditors of the person, firm, or company taken, without the consent of the Board of Trade, but the Board of Trade may present a petition for the winding up of the company by the Court, and the making of an order under this section shall be a ground on which the company may be wound up by the Court." Then s. 4, sub-s. 1, of the statute empowers the Board of Trade to "vest in the custodian under the Trading with the Enemy Amendment Act, 1914, any property, real or personal (including any rights whether legal or equitable, in or arising out of property, real or personal), belonging to or held or managed for or on behalf of an enemy or enemy subject, or the right to transfer that property, and may by any such order, or any subsequent order, confer on the custodian such powers of selling, managing and otherwise dealing with the property as to the Board may seem proper." Then s. 15 enacts that "the expression 'enemy subject' means a subject of a State for the time being at war with His Majesty, and includes a body corporate constituted according to the laws of such a State." Sect. 16 provides "This Act may be cited as the Trading with the Enemy Amendment Act, 1916, and shall be construed as one with the Trading with the Enemy Acts, 1914 and 1915, and those Acts and this Act may be cited together as the Trading with the Enemy Acts, 1914 to 1916."

Now, although this Act is to be construed as one with the Trading with the Enemy Amendment Act, 1914, and although the Board of Trade might, had they been so minded in the case of this company, have vested the whole of this property in the custodian under the Act of 1914, with the result that the position of the creditors would have been that which I attempted to explain in *In re Fried Krupp Aktien-Gesellschaft* (1), still that Act does not, I think, help me to solve the question which has now arisen. A comparison of s. 1 of the Act of 1916 with the preamble and vesting section of the Act of 1914 shows that the objects of the two enactments are quite different. The primary purpose of the sections of the Act of 1914 vesting enemy property in the custodian was, as set out in the preamble, "to make further provision for preventing the payment of money to persons and bodies of persons resident or carrying on business in any country with which His Majesty is for the time being at war . . . . in contravention of the law relating to trading with the enemy, and for preserving, with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies," and the payment to their creditors of their debts out of such money is only an incidental purpose of that Act. Sect. 1 of the Act of 1916, on the other hand, does not deal with businesses of enemies in the statutory sense, but with businesses of enemy subjects, or in which enemy subjects mainly are interested or mainly control, and the custodian is given no rights in them at all. What the section does, shortly stated, is to enable the Board of Trade either to restrict the operations of a business to which the Act applies, or to bring it

(1) Ante, p. 194.

altogether to an end by winding it up, the section providing the machinery for, amongst other purposes, the discharge of liabilities out of the assets of the business so wound up.

Nor do I think much assistance in solving the present question can be gained by a reference to the general principles of bankruptcy law to which I was invited to have regard. The winding up directed by the Act is not a winding up of a company, nor the liquidation of the affairs of a firm or individual. It is merely the winding up of a business in the United Kingdom of a particular kind of company, firm, or person; the other property of its owner is left quite untouched by the Act, and, although for convenience the language of liquidation is copiously employed, one may perhaps hazard the conjecture that it was not the apprehended insolvency so much as the reputed acquisitiveness of such businesses that attracted the attention of the Legislature to them in this statute. The truth is that although since the present war began we have been made familiar with the notion of branches and agencies as things distinct from the principal business of their owners, and as having rights and liabilities of their own, a notion, for instance, very clearly embodied in the licences granted by the Secretary of State to the London agencies of enemy banks and in the Proclamation of September 9, 1914, still I conceive that notion is unknown to the common law, and a statute which for its own purposes gives it effect must itself be referred to in order to ascertain the incidents which either expressly or by reasonable implication it has attached to the conception.

Now it will be noticed that in s. 1, sub-s. 3, of this Act the direction is to discharge unsecured debts due to creditors who are enemies and unsecured debts due to creditors who are not enemies. The subsection does not say what unsecured debts or whose unsecured debts are to be so discharged. In this respect the expression in the sub-section differs from the corresponding expression in sub-s. 4. There the controller is to value the assets of the business in enemy territory and the liabilities of the business to creditors in enemy territory. It differs also from the expression in sub-s. 7 which prevents, without the consent of the Board of Trade, any steps being taken for the enforcement of the rights of any creditors, not simply of the business, but of the person, firm, or company.

The question, therefore, in this case is whether the creditors referred to but not specified in sub-s. 3 are the creditors of the business as mentioned in sub-s. 4, or the creditors of the company as mentioned in sub-s. 7.

In my opinion, they are the creditors of the business. Mr. Cunliffe's main argument to the contrary was that there was no such thing as a creditor of a business, but that contention is not, I fear, open to him on this Act of Parliament, for the equivalent of that very expression, as I have said, is to be found in sub-s. 4, under which sub-section the controller is expressly directed to ascertain the liabilities of the business to creditors in enemy territory. Now if the controller can ascertain who these creditors are—and the statute assumes that he can and will—he can with equal ease or trouble ascertain who are the creditors of the business not in enemy territory. And, this difficulty out of the way, sub-s. 3 points, I think, to creditors being referred to who are less extensive as a class than creditors of the company. It cannot, I think, for instance, have been intended by that sub-section that the employees, say, of the business of the company in a neutral country, in no way touched by the winding up order, were to rank preferentially on the assets of the British business, although such would be the result of Mr. Cunliffe's view; and, further, sub-s. 4, I think, clearly contemplates that it is only the creditors of the business in enemy country, there and not elsewhere, who are to rank against the business assets here. In my opinion as a matter of construction these creditors are the same persons as the creditors who are enemies referred to in sub-s. 3. Indeed it is to my mind almost inconceivable that the Legislature should even by this statute have required the enemy creditors of the business to pay themselves first out of the business assets in enemy territory and rank against the business assets here only for the balance, but should have left enemy creditors of the company to rank against the business assets here for their whole debt, and that without having to bring into account the company's assets not business assets in enemy territory or anywhere else.

But it is said that sub-s. 7 clearly shows that creditors of the company and not creditors of the business are meant in sub-s. 3, because it cannot be supposed, so runs the argument, that the Legislature could have intended to stop from enforcing his legal right a creditor for whose claim it made no provision by the winding up order itself. Reference also was made to the wide terms of the sub-section, and it was said that not only does it in this case prevent the creditor of the company from asserting his rights against the assets of the business, but it prevents him without the leave of the Board of Trade from taking in this country any steps at all against the company or its other property. I feel the force of this argument, and I do not see how upon construction it is possible to limit the words of prohibition to proceedings affecting the assets of the business only. Nevertheless I do not think that the contention, rational as it is, can prevail against the considerations in favour of the opposite view of sub-s. 3 to which I have already referred. I think it must be taken that the Legislature had confidence that the Board of Trade would refrain from interposing their veto to any proceedings which would not interfere with or embarrass the winding up. Furthermore, their veto, at the worst, would only be temporary, and the creditors of the company will have this advantage from the winding up of the business, that the result of that winding up may be to produce a fund for payment of the general creditors of the company who have been delayed by it. Moreover, one must recognize that this is not the only unusual provision to be found in this Act. It is, to say the least, unusual to charge the costs of winding up upon the assets of the business in priority to all previous charges thereon, as this Act does in s. 1, sub-s. 2; and the provision in s. 3 that the assets are to be applied in discharging unsecured debts due to creditors who are not enemies in priority to the unsecured debts due to creditors who are enemies is so striking that it may even be doubted whether it would have been inserted in the Act by those responsible for it if its full effect had been duly appreciated. For the result of that provision, contained as it is in a statute designed to penalize an enemy subject, is to give to, amongst other persons, enemy subjects, even in a neutral country and although they had not contracted for it, a preference in distribution over enemies in the strict sense of the word who need not be enemy subjects at all, and that notwithstanding that it is open to these enemy subjects in neutral countries to receive their money and if so minded remit it to enemy territory, although any money going to an enemy in the statutory sense would be vested in the custodian and so far as it was not applied in payment of his admitted debts would be retained by the custodian with a view to arrangements at the conclusion of peace. It may indeed even be doubted whether, if the effect of the statute had been fully envisaged, a preference, not contracted for, would have been given over enemies even to British creditors, seeing that the preference is in the result enjoyed at the expense not of the enemy creditors, but either of their British creditors or of the State as benefited by the vesting section of the Act of 1914. In truth the statute seems to bear upon its face traces of a parliamentary ordeal through which it probably passed, and the provisions of a single sub-section, which may, on one view of the statute, appear to be unusual, are not enough as matter of construction to lead the Court to take another view of the Act if that view in turn would seem to be in conflict with its general scheme. And that general scheme for the present purpose, on a view of the Act as a whole, I think is that out of the business assets the liabilities of the business properly chargeable against it, and no others, are to be paid. Probably the closest analogy to the sense in which the expression is used would be found in the case of a man who under his own name carried on business with another when against both himself and his partner individually and against the partnership firm an adjudication in bankruptcy was made. The joint debts in such a case would correspond to the debts of the business, which under this statute are to be paid by the controller; the separate debts of the partners would correspond to those which are not.

It remains now to consider whether the debt of Messrs. Gottschalk and Davis is a debt of the business within the meaning of this judgment. The debt is for an instalment of purchase-money payable by the company under a contract dated December 24, 1913, a contract for the purchase by the company from these creditors and one Julius Dreyfuss, a German gentleman, with whom they were then in partnership, of a business belonging to them in New York.

The purchase price was payable by instalments; it was expressed in dollars, but payment was to be made in London at the exchange of the day. Of that purchase price 40,000 dollars was payable on the execution of the agreement, 10,000 dollars on April 1, 1914, 10,000 dollars on April 1, 1915, 10,000 dollars on April 1, 1916, and

10,000 dollars on April 1, 1917, together with interest. The 40,000 dollars and the instalment of 10,000 dollars on April 1, 1914, were duly paid by, I gather, the German company at Berlin direct.

Before the instalment of April 1, 1915, became due, however, not only had the war supervened, but Mr. Eves had been appointed supervisor of the London business, and the German company, doubtless recognizing that it was greatly to its interest to apply its English assets to payment of any of its debts for fear that they might meet with a worse fate, drew a cheque for that instalment on the London banking account and sent the cheque to New York, whence it was transmitted to England and tendered in payment of the instalment. Application was made to the parliamentary counsel to allow payment to be made by honouring the cheque, and counsel, treating the payment simply as one made in respect of a pre-war transaction, and having no notice that it might more properly and could as easily have been made from America and so incidentally have improved the exchange with that country, allowed the cheque to be met, and in like manner authorized a similar payment to be made of the instalment due on April 1, 1915. Before that payment could, however, be carried out the winding up order was made, and it is in respect of that instalment that the respondents now claim to rank as creditors in the winding up of this business.

In my opinion their debt is not in any sense a debt of the English business. That business is not in any way mentioned or referred to in the agreement under which it arises. The English business derives no benefit from the transaction of purchase, and at least one person, Mr. Julius Dreyfuss, the respondents' former partner, is interested in the American business purchased, but he has apparently no interest in the English business. Moreover, the payments made since the war with the consent of the Treasury out of the English assets in respect of the purchase-money have, I cannot doubt, been made by the enemy thereout for interested and for no other reasons. So far from these payments justifying the payment of the balance out of the same assets, the respondents have, I think, reason to be thankful that they have been made at all.

In my opinion, therefore, the respondents are not entitled to rank as creditors against the business assets either for this or future instalments of purchase price; but when the winding up of this business is completed and the surplus accruing to the enemy company is, as it will be, vested in the custodian, it will then be open to them to apply for payment out of the surplus, and their claim will be dealt with fairly and equitably on the principles indicated in *In re Fried Krupp Aktien-Gesellschaft.* (1)

In the view I take of the main point it is unnecessary for me to deal with the second objection to the respondents' claim to rank—namely, that in respect of their lien for unpaid purchase price they are secured and not, as they must be under the statute, unsecured creditors only. I may say, however, that as at present advised I think this objection would also disentitle them to prove on the present evidence for the full sum, or indeed for any part of the sum claimed by them.

Further, having regard to my view of the statute, it is unnecessary that I should deal with the form of the winding up order. If on its true construction that order does provide for payment of all debts of the company, then it is not to that extent authorized by the statute.

In these circumstances the answer to each question of the summons must be in the negative, and as to costs I think the proper order will be that the controller be directed to pay the costs of the respondents (including the costs of the Board of Trade) and to take his own out of the assets in his hands, all the costs so paid and retained being treated by him as payments out of the assets in the winding up, and dealt with in accordance with sub-s. 2 of s. 1 of the Act.

Solicitors: *Roney & Co.; Solicitor to the Board of Trade; Jacobs & Greenwood.*

(1) Ante, p. 194.

W. I. C.

PRITCHETT & GOLD AND ELECTRICAL POWER STORAGE COMPANY, LIMITED *v.* CURRIE.

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July 7, 8.

[1914 P. 2325.]

Contract—Sale of Article to be erected on Premises of Purchaser—Sub-contract—Property in Incomplete Article—Lien of Sub-contractor for Purchase-money—Delivery of Materials—Passing of Property—Sale of Goods Act, 1893 (56 *&* 57 *Vict. c.* 71), *s.* 18, *r.* 5.

The defendant company contracted with C. to provide an electrical installation, including, inter alia, a storage battery, at her house for 1363*l.* The defendant company then sub-contracted with the plaintiffs for the supply of the battery to be erected by them on C.'s premises at the price of 286*l.*, including erection. In accordance with the terms of the sub-contract the plaintiffs sent the materials for the battery by rail to a specified station, whence they were to be carted by the defendant company to C.'s premises and there erected by the plaintiffs. The defendant company carted the goods, but the plaintiffs did not proceed with the erection of the battery, which was ultimately completed by the defendant company, who went into liquidation.

In an action against C. (to which the company was added as a defendant), C., in pursuance of an order (made by the Master upon a summons for directions), paid into Court the sum of 269*l.*, part of the balance owing by her to the defendant company, and upon that proceedings were stayed as against her :—

Held, (1.) upon construction of the sub-contract, that it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on C.'s premises ; that the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state within s. 18, r. 5, of the Sale of Goods Act, 1893, and that the property therein passed to the defendant company ; and (2.), assuming that the property in the goods did not pass, the plaintiffs had no lien upon the money in Court, which represented a portion of the consideration payable by C. to the defendant company under the principal contract.

Decision of Sargant J. reversed.

Bellamy v. *Davey* [1891] 3 Ch. 540 doubted and distinguished.

Appeal from a decision of Sargant J.

In February, 1914, the defendant Mrs. Currie entered into a contract with the defendant company for the provision of an electrical installation for her property, known as Upham House, in the county of Wilts, for the sum of 1363*l.* The contract included the supply of an electrical battery and fittings, but no part of the above-mentioned contract price was allocated to the battery and fittings. In April, 1914, the defendant company ordered from the plaintiffs a battery and fittings to be erected at Upham House. The contract was contained in the following correspondence and documents. It appeared that previously to March, 1914, the plaintiffs had given to the defendant company a quotation for a battery, and on March 27 the defendant company wrote to the plaintiffs: "We shall be much obliged if you will re-quote us for the battery for which we asked you some time ago. A battery of sixty-five cells capable of an output of seventy amperes for ten hours or thereabouts . . . . Your price is to include erection, delivery, and first charge at Upper Upham, Aldbourne Station."

On March 30, 1914, the plaintiffs wrote to the defendant company enclosing an estimate, the material parts of which were as follows:

"Estimate subject to acceptance within thirty days . . . .

"Breakage in Transit.—We accept no responsibility for loss or damage to goods consigned carriage forward. In the case of goods sent carriage paid we only accept responsibility for damage or loss if notice of such damage is received by us within three days after delivery. In either case acid is sent at buyer's risk only.

"Erection.—Prices for erection in all cases include the supervision of first charge and the connection of the cells to each other; . . . . As and from delivery of the goods on your or your customer's premises the same are to be at your risk, and thereafter we are not to be responsible for damage by fire or otherwise . . . . Estimate No. 6574.

"Battery.—Sixty-five 21-plate 'C' type cells in glass boxes, complete with acid, wood trays, oil insulators, glass spray arrestors, glass separator tubes, non-corrosive connecting bolts and standard hydrometer—the sum of 286*l*. . . . .

"Erection. — Erection and superintendence of first charge included.

"Delivery.—F. O. R. Aldbourne . . . ."

"Aldbourne" was inserted by mistake, there being no station of that name. It should have been Chiseldon.

On April 4 the defendant company wrote to the plaintiffs: "We have much pleasure in being able to accept your tender for sixty-five 21-plate 'C' type cells in glass boxes, the price being understood to be complete and erected and to cover the cost of superintendence of the first charge, the delivery to be free to Aldbourne Station."

This letter was accompanied by a formal order: "Please furnish us with the following material in accordance with the conditions on the face and back of this order, which must be strictly complied with." Then followed a specification of the materials as set out in the estimate, and "F. O. R. Aldbourne. Your estimate No. 6574."

On April 17 the defendant company wrote to the plaintiffs explaining that the station for Upper Upham was Chiseldon, and not Aldbourne. On May 29, 1914, the plaintiffs wrote to the defendant company:

"We beg to advise you that we have this day despatched per rail carriage paid the undermentioned goods to your order 4523/A 27 addressed to your order at Chiseldon Station.

"Important.—We accept no liability for loss or damage in transit on goods consigned carriage forward. In the case of consignments sent 'carriage paid' all goods should be examined before the carrier's delivery sheet is signed, and in the case of any loss or damage same should be noted on the delivery sheet. An advice giving full particulars of any loss or damage must be sent to us at the above address, so that we receive the same within three days after delivery of the goods. Unless these instructions are carried out, we cannot hold ourselves responsible for any loss or damage in transit." Then followed an enumeration of the goods sent, concluding with "acid and springs to follow."

The goods were carted by the defendant company from the station to Upper Upham, that being part of the arrangement between the parties; but for various reasons the plaintiffs, who had become suspicious of the defendant company's credit, did not proceed with the erection of the battery at Mrs. Currie's house, and ultimately the defendant company themselves, under protest from the plaintiffs, put the battery together. On August 15, 1914, the defendant company went into voluntary liquidation.

On September 14, 1914, the plaintiffs wrote to Mrs. Currie claiming that they were entitled to recover from her possession of the

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materials comprised in the battery, and on December 11, 1914, they commenced this action against her for a declaration that the goods in question were their property. Upon the application of Mrs. Currie the company were made defendants to the action, and upon a summons by the plaintiffs for directions it was ordered that (without prejudice to any question between the plaintiffs and the defendant company) Mrs. Currie should pay into Court the sum of 269*l.* 9*s.* 6*d.* (portion of the balance of the contract price alleged to be payable by her to the defendant company) less the amount of her costs of the action, and that upon such lodgment being made by Mrs. Currie all further proceedings in the action be stayed as against her. This order was made by the Master under protest by both the plaintiffs and the defendant company.

The statement of claim having been delivered, the defendant company, by their defence and counter-claim, asked for payment out to them of the sum which, in pursuance of the Master's order, had been paid into Court by Mrs. Currie.

Upon the hearing of the action Sargant J. came to the conclusion that the true contract was not for the sale of the separate component parts of the battery, but for the sale of a battery to be erected on Mrs. Currie's premises, and that the goods were not in a deliverable state within s. 18, r. 5, of the Sale of Goods Act, 1893, until the complete battery had been constituted out of its component parts, placed in position, connected up, and given a first charge with the sulphuric acid. He held, therefore, that the property in the goods had not passed to the defendant company, but remained in the plaintiffs, who were entitled to have the money in Court paid out to them. From this decision the defendant company appealed.

Romer, *K.C.*, and *H. E. Wright*, for the appellants. The property in these goods which were sent by rail by the plaintiffs to the order of the defendant company must be treated as having passed to the purchasers the defendant company. The goods were appropriated by the plaintiffs to the order and delivery was accepted by the defendant company. It is like the sale of a bedstead or a portable greenhouse to be erected on the premises of the purchaser. The property in the goods passed on delivery. *Bellamy* v. *Davey* (1) was relied upon by the plaintiffs in the Court below, but that is very different from the present case. There the sub-contract was for the supply of the same article as was the sole subject of the principal contract. There the goods were not completed or delivered and the property clearly had not passed. Here the property in the goods has passed to the defendant company, and the plaintiffs can only prove in the liquidation. [They referred to Benjamin on Sale, 5th ed. p. 223.]

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(1) [1891] 3 Ch. 540.

A. Grant, K.C., and *S. P. J. Merlin*, for the respondents. This is not the simple case of a sale of goods. If goods are to be delivered in a deliverable state, and the contract is that something shall be done to them so as to make them into the article contracted for, the property in the goods does not pass upon the mere delivery. The materials supplied are not the articles contracted for in a deliverable state. They are not in a deliverable state until put together: *Anglo-Egyptian Navigation Co.* v. *Rennie.* (1) Delivery is immaterial: *Clark* v. *Bulmer.* (2) There was one contract for the supply and erection of the battery. The goods were never in a deliverable state within s. 18, r. 5, of the Sale of Goods Act, 1893, until the battery was erected, charged, and tested. The plaintiffs could not sue on the contract until the whole of the work was done. What the plaintiffs sold was a battery complete and erected. The whole of the materials for the battery were not delivered. The contract cannot be severed into two portions, namely, the supply of the materials and the erection. The goods were not "unconditionally appropriated in a deliverable state." The contract was not for the sale of specific goods, but for the sale of certain goods of a particular kind made into a complete battery and erected at the defendant Mrs. Currie's house. The property in the goods never passed, and the plaintiffs are entitled to have the money in Court paid out to them: *Bellamy* v. *Davey* (3); *Seath & Co.* v. *Moore.* (4)

[LORD COZENS-HARDY M.R. The money in Court is part of what is due from Mrs. Currie to the defendant company. How can you claim that ?]

The plaintiffs are entitled to follow it as the price of the goods supplied by them.

(1) (1875) L. R. 10 C. P. 271.
(2) (1843) 11 M. & W. 243.
(3) [1891] 3 Ch. 540.
(4) (1886) 11 App. Cas. 350.

[PICKFORD L.J. referred to *In re Maryport Hematite Iron and Steel Co.* (1)]

We rely on *Bellamy* v. *Davey.* (2) See also *Ex parte Golding, Davis & Co.* (3)

[LORD COZENS-HARDY M.R. This is not a case of stoppage in transitu.]

The Master made the order upon the authority of *Bellamy* v. *Davey.* (2) It is admitted that the plaintiffs can only succeed upon that case.

Romer, K.C., in reply. The reasoning on which *Ex parte Golding, Davis & Co.* (3) was based is criticized in Benjamin on Sale, 5th ed. p. 921. In *Bellamy* v. *Davey* (2) the work was really completed by arrangement between the parties. It is not a satisfactory authority, and at any rate is distinguishable from this case.

LORD COZENS-HARDY M.R. This appeal from the decision of Sargant J. raises some curious points. The first is a question not involving any general principle of law, but involving the construction of a somewhat obscure contract. On the one side it is said that the property in the subject-matter of the contract remained in the plaintiffs and did not pass to the defendant company. That is denied by the other side. The main bulk of the argument which we have heard depends upon that issue.

The other point is this: Whether the property passed or not, are the plaintiffs entitled, as against the defendant company, to claim the money paid into Court in the circumstances which I must shortly mention?

In my view the second point is really the easier one to deal with, and I propose to deal with that first.

Mrs. Currie entered into a contract with the defendant company for the supply of what is called an electrical installation. It was a contract for a large sum. Among the things which were required was a storage battery. The defendants were minded to do that which they had a perfect right to do, namely, to obtain this storage battery from other people. They entered into a contract with the plaintiffs for—I am using a neutral word—the supply of the storage

(1) [1892] 1 Ch. 415.
(2) [1891] 3 Ch. 540.
(3) (1880) 13 Ch. D. 628.

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battery and for what is called its erection. That was, of course, for a much smaller sum than was due as between Mrs. Currie and the defendant company. That was only one of the many things which had to be supplied in order to complete the contract between Mrs. Currie and the defendant company. The defendant company got into difficulties. The plaintiffs commenced this action originally against Mrs. Currie. It is very hard to see what right they had against her. I do not say whether they had or had not a right against her. Mrs. Currie then took a step which has probably been the cause of a great many of the difficulties. She instituted something in the nature of interpleader proceedings (it plainly was not a case for interpleader), and also asked that the defendant company might be made defendants to the action. The Master did not adjourn the case to the judge, as usually would have been done, but he made an order adding the defendant company, and also providing that a sum of 269*l.* less costs, part of the contract price as between Mrs. Currie and the defendant company, should be paid into Court without prejudice to any question between the parties, and proceedings were stayed against Mrs. Currie. The plaintiffs say that they are entitled to this money which is in Court. The learned judge has taken that view. With great respect, I am quite unable to follow that. What is this money ? On the face of it it is part of the contract price to which the defendants are entitled from Mrs. Currie. The only authority in point which is said to support that contention is *Bellamy* v. *Davey*. (1) Without saying whether *Bellamy* v. *Davey* (1) is really an authority upon which the Court can rely, which I very much doubt, it certainly is no authority for a case like the present. In *Bellamy* v. *Davey* (1) there was a contract for erecting two tanks, and there was a sub-contract for the erection of the same two tanks, the identical articles, at a lower price. The tanks were unfinished, in an incomplete state, when the original company became bankrupt or insolvent, and an order was made by North J. upon motion: "Let the tanks be completed by the plaintiff, the sub-contractor, and let him be paid the cost of completion. In the event of their completion let the matter come on in order to decide the rights." In that case Romer J. seems to have held that there was something in the nature of stoppage in transitu (it is very difficult to

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(1) [1891] 3 Ch. 540.

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see how that could be so), and he held that the sub-contractor was entitled to be paid out of the money due from the building owner to the principal contractor. That may be right or it may be wrong; but it is quite impossible to apply that doctrine to a case like this where the principal contract is one for a large number of items involving more than 1300*l.* and the sub-contract is merely for one of the elements to be furnished under that contract and is for a comparatively small sum of money. I know of no authority which can justify such a contention as that which has been urged. I am bound to say that I doubt it, unless it is put on the footing of arrangement between the parties; and even if *Bellamy* v. *Davey* (1) be right it seems to me to be no authority for the order which has been made.

That is really sufficient to conclude this case. Counsel for the defendant company says "This is part of the purchase-money. You must hand it out of Court to me." I can see no answer to that claim. That being so, in the view which I take, it is not strictly necessary to consider the language of the particular contract here—the contract, I mean, between the sub-contractor and the plaintiffs—as to whether the property did or did not pass. It is a point of difficulty. Upon the whole, for reasons which Pickford L.J. will more fully elaborate, I think that the property did pass to the defendant company under the terms of this particular contract. For these reasons I think that the appeal must be allowed.

PICKFORD L.J. I am of the same opinion.

On the first point, namely, whether, assuming that the property did not pass, the money in Court is to be paid to the plaintiffs, that depends upon a rather remarkable order made by the Master in the case. The plaintiffs had sued Mrs. Currie, as has been said, for the value of the materials which they had supplied to the defendants the Hamble River Company for the purpose of their being erected on Mrs. Currie's premises as an electric battery. The Hamble River Company were to do that as part of a much larger contract for the whole electrical installation amounting to about 1350*l.* The Master made an order that, without prejudice to any questions between the plaintiffs and the defendant company, the defendant Mrs. Currie should lodge in Court a certain sum of money, a portion of the balance of the contract price alleged to be payable by her to the defendant company under a contract between them dated April 27, 1914, and it was ordered that on such lodgment all proceedings should be stayed against Mrs. Currie; and it was further ordered "that the plaintiffs do within fourteen days deliver a statement of their claim to the defendants the Hamble River Company, Limited, who are within fourteen days thereafter to deliver their defence and be at liberty therein to set up any counter-claim." The Hamble River Company had been added, on the application of Mrs. Currie, as defendants. The result of that was that a certain sum of money payable by Mrs. Currie in respect of the larger contract was paid into Court and the plaintiffs were to deliver a claim by which they were to establish their right to that sum of money as against the Hamble River Company. I think that one of the learned counsel used the expression that it was a "sort of interpleader"; but it was not an interpleader at all. In order to establish that right, Mr. Grant, for the plaintiffs, concedes, quite rightly, that he must establish that he has a lien upon or a right to follow that particular sum. He also concedes that, unless such a right is given to him by the authority of the case of *Bellamy* v. *Davey* (1) to which reference has been made, he cannot make out such a right because it is the assertion by a sub-contractor of a lien on the whole of the money which is payable by the principal debtor, the building owner, to the head contractor for the amount of his debt. He admits that unless that is given to him by the authority of that case it is contrary to the general rules of law. I do not think that it is in the least necessary for me to consider whether *Bellamy* v. *Davey* (1) is right or is wrong. It is enough to say that, assuming it to be absolutely right, I think it is no authority for the proposition for which the plaintiffs contend in this case. That was a case in which the contractor and the sub-contractor were concerned only with the article that was supplied by the sub-contractor. No doubt the contractor had charged a larger price to the building owner than the sub-contractor charged to him; but that, and that only, was the subject of the contract. It may be—I do not say whether it is or is not the case—that in that case the sub-contractor

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(1) [1891] 3 Ch. 540.

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may have had a lien upon the amount payable to the contractor for the amount due to him, and that only the surplus went to the contractor. It may be so. It seems to me that that does not in any way establish that where there is a sum of money payable to the contractor, not in respect of this only, but in respect of the whole contract, including many other things besides the subject of the sub-contract, the sub-contractor has a lien upon that large sum, which is not connected with him except indirectly, for the payment of his debt. Of course, if he has, every sub-contractor has it. It seems to me that *Bellamy* v. *Davey* (1) is no authority for such a proposition as that. Therefore I think the action fails on that ground. The plaintiffs have to establish their right as against the defendant company. The defendant company is entitled to have this money paid by Mrs. Currie unless the plaintiffs have established a lien upon it. The defendant company is in liquidation, and therefore the money will be distributed amongst the creditors. The plaintiffs have not established any such lien, and therefore it seems to me that they are not entitled to it as against the defendant company or anybody else, and I think that the action fails upon that ground.

The second point is a question, to my mind, of much greater difficulty. I must say that I have doubted very much during the argument what is the proper conclusion. On the whole, however, I have come to the conclusion that I cannot take the same view of the contract as was taken by Sargant J.

[The Lord Justice then considered the correspondence and material documents at length, and came to the conclusion that the contract was for the sale of the component parts of a battery to be delivered at Chiseldon Station. He then continued :]

Turning to the Sale of Goods Act, 1893, we find by s. 18, r. 5, that where there is a sale of unascertained goods, which these were at the time, when the goods are appropriated to the contract the property passes, and that delivery to the purchaser is an appropriation. That seems to be what took place here. Therefore it seems to me that the property in those articles did pass. In fact the key to the whole question (it is not by any means an easy one to find) is, Was this a contract for a completed article, or was it a contract for a number of component parts called compendiously a battery, with an additional contract, a supplemental part of the contract, that after delivery they shall be erected and put together upon some place different from that at which they are to be delivered, and that the price shall be put all in one sum so that payment for the goods shall be deferred, although the property has passed, until the other part of the contract has been performed, namely, the erection upon some place other than that of delivery? As I say, I think that is a difficult question; but the latter seems to me to be the true construction of this contract. If that is so, then the property passed, subject to this one matter to which I ought to refer —that the acid was not delivered until after the liquidation. I think that was treated by the parties as being too small a matter to affect the question of the delivery; but if the defendants chose to accept delivery of the other articles, I think that under the clause they were entitled to do so. They might have said to the plaintiffs "You have not delivered the acid and we will take nothing at all until you do." They did not say that. They took delivery of the other matters and waited for the acid. Under these circumstances I think that the property did pass, and I think, on this head too, although I form my opinion with some doubt, Sargant J.'s conclusion was erroneous, and I agree that the appeal must be allowed.

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(1) [1891] 3 Ch. 540.

WARRINGTON L.J. Sargant J. in this case has made a declaration that the plaintiffs are entitled to the electric battery and fittings in the pleadings mentioned which are now represented by the sum of money which was, by the said order dated March 30, 1915, paid into Court by the defendant Mrs. Currie, and to have the said sum paid to them. That is followed by a direction that the money should be paid out to the plaintiffs.

That declaration involves two points. It involves, first, the proposition that the electric battery and fittings belong to the plaintiffs, and, secondly, that they are now represented by the sum paid into Court.

With regard to the second of those two points I have very little to add; but I would just call attention to this, that the statement that the electric battery and fittings are now represented by that sum seems to have nothing either in the facts of the case or in the

Warrington L.J.

interlocutory proceedings to justify it. If there were anything to justify it at all, it would be the order, which has been the subject of discussion, made by the Master on March 30, 1915. That order certainly did not describe the money paid into Court as representing the electric battery and fittings. It described the money paid into Court as a "portion of the balance of the contract price alleged to be payable" by Mrs. Currie to the defendants "under a contract between those defendants dated on or about April 27, 1914." It seems to me, therefore, that the reason expressed in the declaration of Sargant J. does not exist. Can the order, apart from that reason, be supported in any other way? It is admitted by counsel for the respondents that the only authority which could support the order is the case of *Bellamy* v. *Davey.* (1) It is quite unnecessary to say whether *Bellamy* v. *Davey* (1) on the facts of that particular case was properly decided. All that it is necessary for us to say about it is that it does not apply to a case like the present, where the head contract relates to a number of matters only one of which is covered by the sub-contract. In *Bellamy* v. *Davey* (1) the head contract and the sub-contract were co-extensive so far as their subject-matter was concerned. On the first point I say nothing more than this, that *Bellamy* v. *Davey* (1), whether rightly or wrongly decided, does not apply to the present case.

On the second point, whether the learned judge was right in declaring that the electric battery and fittings in the pleadings mentioned belonged to the plaintiffs, or rather, to follow his words, "that the plaintiffs are entitled to the electric battery and fittings in the pleadings mentioned," I have closely followed the reasons given by Pickford L.J., and I think that it would be sheer waste of time to express the same reasons in my own language. I agree that the appeal ought to be allowed.

Solicitors for appellants: *Bircham & Co.*
Solicitors for respondents: *Claremont, Haynes & Co.*

(1) [1891] 3 Ch. 540.

G. A. S.

PARSONS *v.* EQUITABLE INVESTMENT COMPANY, LIMITED.

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[1915 P. 1674.]

Bill of Sale—Consideration, Statement of—Money "now paid"—Retention by Lender to meet Debt—Debt not yet due—Bills of Sale Act (1878) *Amendment Act*, 1882 (45 *&* 46 *Vict. c.* 43), *ss.* 7, 8.

The plaintiff in 1914 borrowed on a bill of sale from the defendants 400*l.*, repayable by instalments of which 325*l.* was still unpaid, In 1915 she borrowed on a fresh bill of sale from the defendants 450*l.*, of which by agreement 100*l.* was paid to one of her creditors, 25*l.* to herself, and the remainder was retained to meet the 325*l.* This agreement was carried out in such a way that a question arose whether in fact the 450*l.* was at any time at her disposal. The consideration was stated in the second bill of sale to be "450*l.* by the company now paid." The plaintiff also signed a receipt as follows: "I acknowledge to have received from you this day the sum of 450*l.* free from all deductions on a bill of sale and that I have been to the bank and cashed the cheque myself":—

Held, on the facts, affirming the decision of Neville J., that as the 350*l.* was not actually due, it could not be treated as paid, that the consideration for the bill of sale was therefore not truly set forth therein, and that the bill was therefore void.

Where part of the money lent is retained by the lender it will not be treated as paid to the borrower unless it is retained to pay a debt which is actually due.

In re Haynes (1880) 15 Ch. D. 42 and *In re Davies* (1897) 77 L. T. 567; 4 Mans. 358, doubted.

Appeal from a decision of Neville J.

This was an action for a declaration that a bill of sale was void on the ground that it did not truly set forth the consideration for which it was given. The following statement of facts is taken from the judgment of Warrington L.J.:—

The facts of the case are not in dispute. The real question is as to the proper legal inference to be drawn from those facts. The bill of sale is dated May 1, 1915. It witnesses that in consideration of the sum of 450*l.* by the defendants "now paid" to the plaintiff, the receipt of which the plaintiff acknowledges, the plaintiff assigned to the defendants the chattels described in the schedule, by way of security, for the payment of the sum of 450*l.* and interest at the rate of 40 per cent. per annum, and the plaintiff agreed to pay the principal sum with the interest then due by the following payments, namely, 30*l.* on June 1, and the like sum of 30*l.* on the 1st of every succeeding month.

At the date of the bill of sale there was current a previous bill of sale dated July 30, 1914, granted by the plaintiff to the defendants to secure 400*l.* by equal monthly instalments of 25*l.* each. Of these instalments one or more were overdue on May 1, 1915; the rest had not then become due or payable. The total amount of the unpaid instalments was 325*l.* The plaintiff having occasion for a further advance applied to the defendants, and it was agreed that a new bill of sale should be given for the sum of 450*l.*, and that of this sum 325*l.* should be applied in discharge of the bill of sale of July 30, 1914, 100*l.* should be paid to Osborn & Osborn, creditors of the plaintiff for that amount, and the balance of 25*l.* should be paid to the plaintiff. In pursuance of this agreement the bill of sale of May 1 was executed and a cheque for 450*l.* in favour of the plaintiff was drawn by the defendants; she went with the cheque to the defendants' bank, accompanied by one of their clerks; she cashed the cheque, returned with the money to the defendants' office, handed the money to the defendants' manager, who thereout retained 325*l.* in discharge of the old bill of sale, paid 100*l.* to Osborn & Osborn, and paid the 25*l.* to the plaintiff. The plaintiff on the same occasion signed the following document:—

"The Equitable Investment Company, Limited,
147, Cannon Street, E.C.,
1st of May, 1915.

"I acknowledge to have received from you this day the sum of four hundred and fifty pounds free from all deductions on a bill of sale and that I have been to the bank and cashed the cheque myself."

The plaintiff brought an action for a declaration that the bill of sale of May 1, 1915, was void, and Neville J. made an order declaring that it was invalid so far as regarded the personal chattels comprised therein, and granted an injunction restraining the defendants from seizing them.

The defendants appealed.

J. B. Matthews, K.C., and *R. H. Hodge*, for the appellants. The consideration was truly stated in this bill of sale. It cannot be denied that the 450*l.* was in fact paid by the company to the plaintiff, and any collateral agreement as to what is to be done with it is immaterial: *Thomas* v. *Searles* (1); *In re Davies* (2); *In re Haynes.* (3) It is said that the money was bound in her hands by a trust, but there is no authority for saying that that makes the statement untrue. It has frequently been held that part of the money may be retained by agreement as against a debt already due by the grantor to the holder, and that that is a payment and forms part of the consideration.

W. Copping, for the respondent. The money never was paid to the plaintiff; she never was mistress of it; she could not have taken it for her own use. The money secured by the old bill of sale was not actually due, so the appellants had no right to retain it, and the amount thus retained cannot be truly stated to have been paid. This is really a question of fact, and this Court will not interfere: *Richardson* v. *Harris.* (4) The decision in *In re Haynes* (3) was wrong: *Hamilton* v. *Chaine.* (5)

J. B. Matthews, K.C., in reply. What took place was equivalent to a cash payment; *Spargo's Case.* (6) The 325*l.* was retained by agreement, and the statement that it was paid as consideration was a true statement: *Credit Co.* v. *Pott* (7); *Ex parte Challinor* (8); *Ex parte Bolland* (9); *In re Wiltshire.* (10)

Cur. adv. vult.

July 12. LORD COZENS-HARDY M.R. This is an appeal from a judgment of Neville J. declaring that a bill of sale, granted by the plaintiff to the defendants, is void as to the chattels comprised therein by reason of the consideration for which it was given not being truly stated. The facts are not in dispute. [His Lordship stated them and continued:]

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(1) [1891] 2 Q. B. 408.

(2) 77 L. T. 567; 4 Mans. 358.

(3) 15 Ch. D. 42.

(4) (1889) 22 Q. B. D. 268, 272, 274.

(5) (1881) 7 Q. B. D. 319.

(6) (1873) L. R. 8 Ch. 407.

(7) (1880) 6 Q. B. D. 295.

(8) (1880) 16 Ch. D. 260.

(9) (1882) 21 Ch. D. 543.

(10) [1900] 1 Q. B. 96.

Now the following propositions seem to me to be established by the authorities. In the first place, a sum of money paid by the bill of sale holder at the grantor's request to a creditor or another person is properly described as a payment to her. This justified the payment of 100*l.* to Osborn & Osborn. In the second place, if there is a sum of money due from the grantor to the bill of sale holder less than the sum professed to be advanced, the retention of that sum and payment of the difference only to the grantor may be treated as payment of the whole sum to him. This proceeds on the well-known principle of which *Spargo's Case* (1) is an illustration, namely, that it is not necessary to go through the form of handing the entire loan to the grantor and for her then to return the amount to be retained. Such a transaction would be within a plea of payment under the old law. In the third place, this doctrine has no application unless the amount retained is at the time due and payable. It will not justify the retention of an amount secured by bills or acceptances not yet due. In the fourth place, the retention by the bill of sale holder of moneys not yet due is, in the language of Fry L.J. in *Richardson* v. *Harris* (2), the taking of a bonus "which does not appear on the statement of the consideration." In the present case it seems to me that the defendants have done exactly that which in *Richardson* v. *Harris* (3) this Court said could not be done, and on that ground I think the bill of sale is void.

Out attention was called to various authorities, which, with one exception, do not present any difficulty. The exception is *In re Haynes.* (4) That decision seems to me to be inconsistent with the subsequent decision of this Court in *Richardson* v. *Harris* (3), and was at least doubted in *Hamilton* v. *Chaine.* (5) In these circumstances I am justified in following *Richardson* v. *Harris.* (3)

It was admitted that under s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, the right to seize or take possession of the chattels comprised in a bill of sale gave a right to sell unless under the proviso to that section the Court thought fit upon terms to restrain a sale. But the seizure did not make the whole amount of the future instalments presently due and payable. It was not even an absolute right to sell, for the form of the proviso negatives that idea.

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(1) L. R. 8 Ch. 407.
(2) 22 Q. B. D. 276.
(3) 22 Q. B. D. 268.
(4) 15 Ch. D. 42.
(5) 7 Q. B. D. 319.

It was also endeavoured to support the bill of sale on the ground that the money (450*l.*) was actually paid in cash to the plaintiff, and was at her entire disposition to deal with as she might think fit In my opinion the form which the documents took cannot support a transaction in which it is impossible to suggest that in truth and in honour she was ever at liberty to deal with the money except upon the terms expressed in the agreement for the loan itself.

The provisions of the Bills of Sale Act are no doubt rigid, and, in some respects, not consistent with ordinary ideas of fairness. I will only add that if money-lenders will state the actual transaction they will have little difficulty in escaping the suggested unfairness of the Act.

In my opinion the appeal fails and must be dismissed with costs.

PICKFORD L.J. In this action the plaintiff claims to have it declared that a bill of sale given by her is invalid on the ground that the consideration is not truly stated. [His Lordship stated the facts and continued :]

On the evidence before us the transaction seems to me to have been a perfectly honest and straightforward one, entered into by the plaintiff with a full knowledge of what she was doing and without deception or compulsion on the part of the defendants. She does not complain of extortion, and it looks very like an attempt by her, either in her own interest or that of some other person, to evade a just liability on the ground of a technicality. Still she is entitled to do so if she can.

The consideration was stated as 450*l.* " now paid," and the question is if that is correct. In order to make it so the money must either have been handed over to her under such circumstances that she had a real control and power of disposition over it, or if she had not such a control and power, and what happened amounted to a retention of part of it by the defendants, the retention must have been under such circumstances as to amount to payment.

The greater part of the argument before us turned upon the question whether, assuming retention, the circumstances did amount to payment.

There was no debt to the amount of 325*l.* due and payable to the defendants in the sense of being recoverable by action, but it was argued that it was due and payable in the sense in which those words are used in the decisions on this subject. I do not think this is correct. It is, I think, clearly decided in *Richardson* v. *Harris* (1) that, in order to make such a retention of money by the lender payment, the money must be retained against an actual debt then due and payable by the borrower, and that a retention to satisfy a liability which has not at the time matured into a debt cannot be truly described as payment. Here there was no debt to the extent of 325*l.* due and payable from the plaintiff to the defendants. The defendants could not sue her for the amount, but they had only a right to realize a security and recoup themselves out of the proceeds subject to the power of the Court to give relief against such seizure on such grounds and to such extent as should seem right. This is not payment within the case to which I have referred, which is, I think, now the leading authority on the subject, and considerably narrows the effect of some earlier cases, such as *In re Haynes.* (2)

In order, therefore, to succeed the defendants must show that there was a handing over to the plaintiff so as to give her the control and power which I have mentioned. If there be such a handing over, I think the consideration is truly stated as now paid even though she afterwards handed part of it back in discharge of a liability not matured into a debt by reason of an agreement made to do so at the time of the loan: see *Thomas* v. *Searles.* (3)

I have had great difficulty on this point, especially in view of the case of *In re Davies* (4), where Wright J. held that there was such a handing over as to make the borrower domina of the money under very similar circumstances. It appears from the report in 4 Manson that in that case the borrower remained in the lender's office while her maid, accompanied by a clerk of the lender, went to the bank, obtained the money, and brought it back to her mistress in the lender's office, where it was distributed as in this case.

We have a very imperfect note of the decision of Neville J. in this case, but I certainly gather that *In re Davies* (4) was cited to

(1) 22 Q. B. D. 268.
(2) 15 Ch. D. 42.
(3) [1891] 2 Q. B. 408.
(4) 77 L. T. 567; 4 Mans. 358.

him, for he uses the same expression of the plaintiff being domina of the money. He, however, came to a contrary decision to that of Wright J. and held that in this case there never was any real control or power of disposition in the plaintiff at all.

I cannot think that the money was impressed with any trust or that it would have been a criminal act, as it was suggested, in the plaintiff to have taken the money away and not carried out her contract to repay the defendants; but, looking at all the circumstances, I do not think she had the real control and power of disposition of this money. I can see no reason for sending the clerk with her except to put pressure upon her and to see that the money did not go to any one but the defendants. I do not think he would, as suggested, have given her into custody or used violence, but I think he would have used all lawful pressure, and that she was not really a free agent in the matter, and that in substance what took place was a retention of the money by the defendants.

There may have been circumstances in *In re Davies* (1) which do not exist here; if there were not, we have before us two different decisions of judges of co-ordinate jurisdiction, and I prefer that of Neville J.

I think the appeal should be dismissed.

WARRINGTON L.J. The plaintiff in this case claims a declaration that a bill of sale of certain furniture by way of security is void as to the chattels comprised therein by reason that it does not truly set forth the consideration for which it was given. Neville J. has allowed the plaintiff's claim and declared the bill of sale to be void. The defendants appeal. [His Lordship stated the facts and proceeded:]

Those are the facts. One fact is of paramount importance, namely, that the 325*l.* or the bulk of it was not on May 1, 1915, actually due and payable by the plaintiff to the defendants. It only became payable by virtue of an agreement forming an essential condition of the contract of loan. It is true that under the provisions of the Bills of Sale Act, 1882, the defendants might have seized the goods and have realized the security by sale unless prevented by an order of the Court. But this provision deals only with the

(1) 77 L. T. 567; 4 Mans. 358.

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realization of the security and not with the personal liability of the grantor. She was liable only for the instalments then due and unpaid.

The Bills of Sale Act, 1882, requires that the bill of sale shall truly set forth the consideration for which it is given, otherwise it shall be void as regards the personal chattels comprised therein. The bill of sale in the present case states simply that it was given in consideration of the sum of 450*l.* now paid by the defendants to the plaintiff. Was that in substance a true statement?

On the face of the transaction the money was no doubt paid to the plaintiff; she went to the bank and received the money on the defendants' cheque and had it in her possession until she handed it to the defendants' manager on her return to the office. This, however, in my opinion is not enough. I think it must be shown that the money was in substance and not merely in form paid to the plaintiff—in other words, that she had dominion over it. Was it so in the present case? At the time the money was received by her she was subject to a binding agreement, part of the terms on which the loan was made, that part of it should be applied in payment of a sum of money to the lender, not in respect of a debt actually due, but one which only became due by virtue of the agreement itself. It is true she might have retained the money and allowed herself to be subject to such legal consequences as might ensue, but she was under strong moral pressure not to take that course; if she had done so she must have been aware that the defendants would seize and sell her furniture under the old bill of sale, and moreover she was at all times under the eyes of the defendant's clerk, sent, I have no doubt, for the express purpose of preventing any evasion on her part. There is no question that if the 325*l.* had been retained by the defendants the consideration would not have been truly stated: *Hamilton* v. *Chaine* (1); *Richardson* v. *Harris* (2); and in my opinion the transaction in this case was in substance retention, though in form it was payment of the 450*l.* to the plaintiff and repayment of 325*l.* by her to the defendants. I need hardly add that the formal acknowledgment signed by the plaintiff does not affect the substance of the transaction.

There are, however, certain cases to which it is necessary to refer

(1) 7 Q. B. D. 319.

(2) 22 Q. B. D. 268.

as they have been relied upon as decisions adverse to the view I have expressed. Before dealing with them I would point out that there is authority in the Court of Appeal for the proposition that if the lender retains out of the loan a debt of the borrower actually due and payable independently of the agreement for the loan, he may be regarded as having in law paid the whole of the loan; this result being derived from the analogy of a debtor who is allowed to support a plea of payment of his whole debt by proving retention of a debt due from his creditor to himself and payment of the balance only to his creditor: *Richardson* v. *Harris*. (1) One of the cases I have referred to is *Thomas* v. *Searles* (2), but in that case the borrower was for a considerable time, namely, two days, in possession of the money and free from any personal influence, and the Court held on the facts, as I understand, that the whole money advanced ought to be treated as really paid to and under the dominion of the borrower. Moreover, for anything that appears to the contrary the money paid to the lender was in respect of a debt actually due. As to *In re Davies* (3), I can only say that I doubt if I should in that case have come to the same conclusion as the learned judge, and at all events the facts there are not identical with those of the present case. Moreover, in that case also it is not stated that the money owing on the old bill of sale was not actually due and payable.

In re Haynes (4) is undoubtedly more difficult to deal with. In all essential respects the facts were, I think, undistinguishable from the facts of the present case. The correctness of that decision, however, has been doubted: see *Hamilton* v. *Chaine* (5) and *Richardson* v. *Harris* (1); and it is not a satisfactory one for the reason that the distinction between payment of a debt actually due and one that only becomes due by virtue of the agreement for loan does not seem to have occurred to the judges in that case. I cannot reconcile it with *Richardson* v. *Harris* (1), and I think I ought to prefer the views expressed in the latter case.

I think it comes to this, that if the lender stipulates in the contract of loan for some advantage to himself—a bonus as it is called by Fry L.J. in *Richardson* v. *Harris* (1)—he cannot be said to be

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(1) 22 Q. B. D. 268.
(2) [1891] 2 Q. B. 408.
(3) 77 L. T. 567; 4 Mans. 358.
(4) 15 Ch. D. 42.
(5) 7 Q. B. D. 319.

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paying the whole of the money to the borrower unless the latter is really free to deal with it as he pleases, even to the extent of refusing to comply with such stipulation. I do not think the plaintiff was so free in the present case, and the appeal therefore fails.

Solicitors for appellants: *Greig & Kearney.*
Solicitors for respondent: *Donisthorpe & Co.*

H. C. R.

SARGANT J.
1916
June 29.

In re BRAILSFORD.

HOLMES *v.* CROMPTON & EVANS' UNION BANK.

[1916 B. 776.]

Will—Real Estate—Trusts during Life of Widow—After her Death Devise to A., his Heirs and Assigns—Double Gift over in Events of A. dying without leaving or leaving Issue—Defeasibility restricted to Lifetime of Widow.

Testator devised real estate to trustees upon certain trusts during the life of his widow, and after her death devised the same unto his son, "his heirs and assigns," with a double gift over in case he should die either without leaving or leaving issue. The widow pre-deceased the son:—

Held, that according to the true construction of the will the son became indefeasibly seised in fee simple on the death of the widow.

Gee v. *Manchester Corporation* (1852) 17 Q. B. 737 followed. *O'Mahoney* v. *Burdett* (1874) L. R. 7 H. L. 388 distinguished.

Adjourned Summons.

Samuel Brailsford by will dated January 25, 1873, devised his real and personal estate to trustees upon trust to divide his personal estate between his wife and his son Samuel after payment of his debts, funeral, and testamentary expenses, "and upon further trust to pay the income of my real estate situate in Compton Street in Chesterfield in reduction of the debt owing by me to the Chesterfield and North Derbyshire Building and Investment Society, and when the same is cleared or paid off upon trust to pay to my wife during her natural life or so long as she continues my widow and unmarried the sum of four shillings weekly and every week out of the said rents of the Compton Street property, and also to pay to her during such time as aforesaid the rents of my two cottages and gardens situate on Brimington Common; the residue of the rents of the Compton Street property to be paid to my said son Samuel, when and after the building society shall be paid off; and from and after the decease or second marriage of my wife, whichever event shall first happen, then I give and devise unto my said son Samuel, his heirs and assigns, the two houses situate in Compton Street aforesaid; and I also give and devise unto my daughter Mary, her heirs and assigns, my two cottages and gardens situate on Brimington Common aforesaid, the same to be for her separate use . . . . and, in case of the death of either of my said son or daughter without leaving lawful issue him or her surviving, then and in such case I give and devise the said real estate so devised to such dying child unto the survivor of them, his or her heirs and assigns; and further, in case of the death of my said son or daughter leaving lawful issue him or her surviving, then I give and devise the said real estate of such deceased child unto his or her child or children in equal shares if more than one."

The testator died in 1877. The widow died in 1901. The debt to the building society had long since been paid off, and the son Samuel had executed a charge on the two houses in Compton Street in favour of the defendant bank. He had lately sold the two houses, making a title to the purchaser under the Settled Land Acts, and the purchase-money was in the hands of the trustees, who had been appointed trustees for the purposes of the Acts. The son was bankrupt. He had children. This was an originating summons taken out by the trustees for the determination of the question whether on the death of the widow the son Samuel became indefeasibly entitled to an estate in fee simple in the two houses in Compton Street or the proceeds of sale thereof, or whether his children had any and what interest therein.

Manning, for the summons.

H. Greenwood, for defendant bank and the trustee in bankruptcy of the son. The son took an indefeasible estate in fee simple on the death of the widow. Where a gift to A. in emphatic words pointing to absolute ownership in the case of personalty or to an estate in fee simple in the case of real estate is followed by double gifts over on the death of A. which exhaust all possibilities, the gifts over will be restricted to the event of death before the property vests in possession. Otherwise the double gifts over would have the effect of cutting down the interest of A. to a life interest, which is repugnant to the express emphatic words of absolute ownership: *Clayton* v. *Lowe* (1); *Gee* v. *Manchester Corporation* (2); Hawkins on Wills, 1st ed. pp. 258, 259; 2nd ed. pp. 309, 310; Theobald on Wills, 3rd ed. p. 454. This principle is admitted in *O'Mahoney* v. *Burdett.* (3) *Clayton* v. *Lowe* (1) was distinguished and criticized in *Gosling* v. *Townshend* (4) and *Cooper* v. *Cooper* (5) so far as it is supposed to have decided that a double gift over on death leaving issue and death without leaving issue is equivalent to a gift over on death simply. But no judgments appear to have been delivered in that case, and the certificate of the judges gives no reasons for their decision, which can be supported on the ground that the double gift over followed emphatic words pointing to an absolute interest, namely, "shall be equally divided between" named persons "share and share alike for ever." This would bring the case within the principle of *Gee* v. *Manchester Corporation.* (2) The ground of the decision in *Clayton* v. *Lowe* (1) appears to have been misapprehended in some quarters. The present is a stronger case, for there is an express devise to the son, "his heirs and assigns," the proper technical words to create a fee simple. In this respect the present case is on all fours with *Gee* v. *Manchester Corporation* (2), which was followed in *Woodburne* v. *Woodburne.* (6) The decision in *Slaney* v. *Slaney* (7), although based on the fourth rule in *Edwards* v. *Edwards* (8) (which was overruled in *O'Mahoney* v. *Burdett* (3)), can be supported on the authority of *Gee* v. *Manchester Corporation.* (2) The last-mentioned case was cited, and not questioned, in *Cooper* v. *Cooper* (5) and *Bowers* v. *Bowers.* (9) The two latter cases are distinguishable on the ground that the double gifts over followed gifts in general terms without any emphatic words of absolute ownership. The suggestion that Knight Bruce V.-C. declined to follow the decision of the Court of Queen's Bench in *Gee* v. *Manchester Corporation* (2) appears

(1) (1822) 5 B. & Al. 636.
(2) 17 Q. B. 737.
(3) L. R. 7 H. L. 388.
(4) (1853) 2 W. R. 23.
(5) (1855) 1 K. & J. 658.
(6) (1853) 23 L. J. (Ch.) 336.
(7) (1864) 33 Beav. 631.
(8) (1852) 15 Beav. 357.
(9) (1870) L. R. 5 Ch. 244.

to be unfounded. The case came before the Vice-Chancellor in 1850 (1); and what he then said was: "The question is this: am I warranted, under these circumstances, in introducing the words 'in my lifetime' in the latter part of the will? I think that I am not. At the same time, I will readily send a case for the opinion of a Court of law"; and he subsequently repeated that he could not insert the words without the authority of a Court of law, but that he wished that he could give the fund to the plaintiffs, and that to enable him to do so they would take the opinion of a Court of law. That this was done is clear from the opening words of the report of the case in the Court of Queen's Bench in 1852 (2), where it is referred to as stated for the opinion of that Court by the order of the Vice-Chancellor, and the judgment of Lord Campbell C.J. provided the authority without which the Vice-Chancellor had previously hesitated to act. Further, there is on this will a scheme of division to take effect on the death of the widow, which brings the case within the exception from the rule laid down in *O'Mahoney* v. *Burdett* (3) taken in *Olivant* v. *Wright* (4); and see *In re Thompson to Curzon* (5) and *Ward* v. *Brown*. (6) [He also referred to *Da Costa* v. *Keir*. (7)]

C. Gurdon, for the son's children. The gift over in favour of the children will take effect upon the son's death whenever it may occur, according to the rule now established in *O'Mahoney* v. *Burdett*. (3) There is no scheme of division contemplated by the testator to take effect on the death of the widow, such as there was in *Olivant* v. *Wright* (4) and cases of that character. The trust for the separate use of the daughter is a continuing trust requiring the trustees to retain the property devised to her. Nor is there any necessary conflict between the words of limitation in the devise to the son and the exhaustive gifts over. A fee simple can be properly limited subject to executory limitations which cut it down in any event. There is no distinction in principle between *Gee* v. *Manchester Corporation* (2) and *Clayton* v. *Lowe* (8), and the latter

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(1) (1850) 14 Jur. 825; 19 L. J. (Ch.) 151.

(2) 17 Q. B. 737.

(3) L. R. 7 H. L. 388.

(4) (1875) 1 Ch. D. 346.

(5) (1885) 52 L. T. 498.

(6) [1916] 2 A. C. 121.

(7) (1827) 3 Russ. 360.

(8) 5 B. & Al. 636.

SARGANT J. 1916 BRAILSFORD, *In re.* HOLMES *v.* CROMPTON & EVANS' UNION BANK.

decision has been distinctly disapproved: *Bowers* v. *Bowers.* (1) The decision of the House of Lords in *O'Mahoney* v. *Burdett* (2) makes a new starting point in this class of case. [He also referred to *Farthing* v. *Allen* (3) and Jarman on Wills, 6th ed. p. 2162.]

SARGANT J. This is a difficult case and very near the line. The question is whether the gift over following the gifts under which the children of the testator take is to be construed so as to apply generally to death leaving or not leaving issue at any time or is to be confined to a more limited period so as to apply only to death leaving or not leaving issue during the lifetime of the widow. [His Lordship stated the provisions of the will and continued :] The two alternative events on which the gift over is to take effect are therefore absolutely exhaustive and comprise every possible contingency, and, that being so, the question is whether there is enough in those provisions of the will to exclude the prima facie rule laid down in *O'Mahoney* v. *Burdett* (2), namely, that a reference to the death of a devisee or legatee coupled with a contingency must be construed as extending to the whole lifetime of the latter and is not to be limited to the lifetime of any prior person, in this case the lifetime of the widow.

As was pointed out by James L.J. in *Olivant* v. *Wright* (4), the fourth rule of construction laid down in *Edwards* v. *Edwards* (5), which was overruled by the House of Lords in *O'Mahoney* v. *Burdett* (2), had laid down that the introduction of a previous life estate altered the onus probandi and raised a presumption that the death referred to was a death in the lifetime of the tenant for life unless a contrary intention appeared in the will. That was overruled by the House of Lords, and it is now established that the contingency is to be deemed a continuing contingency in the event of the death of the devisee or legatee at any time unless a contrary intention appears by the will.

It is contended in the present case that there is a sufficient expression of a contrary intention. It is said that the manifest intention is that there shall be a division of the property at the death of the

(1) L. R. 5 Ch. 244.
(2) L. R. 7 H. L. 388.
(3) (1817) 2 Madd. 310.
(4) 1 Ch. D. 346.
(5) 15 Beav. 357.

widow. No doubt the property in question will in all probability be the only property of the testator and will be divided in this sense, that the real estate devised to the son will be handed over to him, although the other property may be retained by the trustees in order to carry out the trust for the separate use of the daughter. But on the whole I do not lay any great stress upon this view of the matter, since the case is not the case of trustees dividing personal estate and so not being able to hand over the property hereafter. The property here is real estate, and if there is any gift over at a future time that is made by way of legal limitation and would operate without any intervention on the part of the trustees. This consideration, therefore, is not in my opinion sufficient to bring the case within *Olivant* v. *Wright.* (1)

But a much more cogent reason for the contention is to be found in the fact that the property is expressly devised to the son, " his heirs and assigns," while if the two alternative gifts over are to be read as taking effect on the son's death whenever it occurs, the combined effect of the gifts over is to cut down what is prima facie an absolute interest to one which is in substance indistinguishable from a life estate. It is true that in point of law there is no objection to the gift of an estate in fee simple coupled with two executory devises which are exhaustive and provide for every event; but it is a curious intention to ascribe to the testator that where by marked words of limitation he has placed the devisee in the position of an absolute owner he should immediately afterwards reduce him practically to a position no better than that of a life tenant; and, bearing in mind that the presumption laid down in *O'Mahoney* v. *Burdett* (2) is only a prima facie presumption, I think that the marked use of words giving an estate of inheritance to the devisee is so far repugnant to a construction of the will which would reduce him practically to the position of a life tenant as to make it reasonable and proper for the Court to limit the time for the operation of the gifts over in such a way as to put the son in the position of being possibly entitled to become at some time during his life the absolute owner of the property.

There is, moreover, a great deal of authority upon the question, and *Gee* v. *Manchester Corporation* (1) is a decision which is directly in favour of the construction which I have adopted. That case itself has never been overruled or even questioned, though a good deal of criticism has been directed to the supposed ground of the decision in the similar case of *Clayton* v. *Lowe*. (2) In *Cooper* v. *Cooper* (3), *Gosling* v. *Townshend* (4), and *Bowers* v. *Bowers* (5), there are observations on *Clayton* v. *Lowe* (2) throwing doubt on its authority if and so far as it is founded on the principle that two exhaustive alternative hypotheses can be grouped together so as to make a certainty and then restricted to the lifetime of the tenant for life in the same manner as if there had originally been one gift over in the event merely of the death of the devisee. In the last case, of course, death being certain and yet referred to as a hypothesis, it is necessary to limit a time within which death is to take place, either the lifetime of the testator or that of the tenant for life, if any; and I quite understand the Court protesting, as it did in the cases which I have mentioned, against any justification of the decision in *Clayton* v. *Lowe* (2) which rests on the ground that the same reasoning can be applied to two hypothetical gifts which happen to be together exhaustive. But as a matter of fact no reasons were ever given for the decision in *Clayton* v. *Lowe* (2), since the Vice-Chancellor had sent the case for the opinion of the common law Court, and the report merely states that a certificate was returned, and it seems to me that the decision in *Clayton* v. *Lowe* (2) does not necessarily rest on any such fallacious reasoning as that which has been commented on in the later cases. I think that it can be justified on the same reasoning as was adopted in *Gee* v. *Manchester Corporation* (1)—namely, the repugnance or incompatibility of a very definite gift in fee simple if that gift is to be coupled with a construction of the will which would forthwith reduce the fee simple to something which is practically no more than a life estate. And it is to be noted that in *Gosling* v. *Townshend* (4) Lord Cranworth L.C. and also, I think, Turner L.J. recognized that the completeness or emphasis of the words by which the original gift is expressed to be a gift in fee simple might very well have an effect on the construction to be put upon a subsequent clause in the will which on one construction would reduce the estate in fee simple to a life estate but on another construction would leave the estate as an effective estate in fee simple.

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(1) 1 Ch. D. 346.

(2) L. R. 7 H. L. 388.

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(1) 17 Q. B. 737.
(2) 5 B. & Al. 636.
(3) 1 K. & J. 658.
(4) 2 W. R. 23.
(5) L. R. 5 Ch. 244.

I ought to add that, this being a question relating to real estate, the Court is even more than usually bound by authority, and the only direct authorities on the point seem to me to be *Gee* v. *Manchester Corporation* (1) and *Clayton* v. *Lowe* (2), both of which are in favour of the construction which I have adopted. The text-book writers are very much at variance on the subject. Mr. Theobald originally took the view which I favour, but in later editions he casts considerable doubt on that view and leaves the question open. Recent editors of Jarman on Wills seem rather to adopt the view that *Clayton* v. *Lowe* (2) was wrongly decided. On the other hand Mr. Vaughan Hawkins, in the only edition of his treatise which he produced himself, definitely favoured the view which I have adopted, and in the recent edition no alteration is made in his statement. In my own opinion this incompatibility between a definite devise in fee simple and the insignificance of the estate to which it would be reduced if the gifts over were held to operate at any time during the life of the devisee in fee simple is sufficient to exclude the prima facie rule laid down in *O'Mahoney* v. *Burdett.* (3)

Solicitors: *Ullithorne, Currey & Co., for H. E. Ward & Co., Chesterfield; Geare & Son.*

(1) 17 Q. B. 737.
(2) 5 B. & Al. 636.
(3) L. R. 7 H. L. 388.

A. C.

NEVILLE J.

1916

July 10, 11, 12, 13, 14, 31.

PEARCE *v.* BULTEEL.

[1915 P. 715.]

Partnership—Insolvency—Real Estate—Death of Partner—Will—Trust to pay Debts—Surviving Partner Residuary Legatee—Partnership Debts unpaid—Conveyance to Residuary Legatee—False Recital—Mortgage by Residuary Legatee—Legal Estate—Purchaser for Value without Notice—Conversion of Partnership Assets—Bankruptcy of Partnership—Priorities—Statute 13 *Eliz. c.* 5.

The partnership deed of a banking business provided that the whole of the capital of the business as appearing in the private ledger of the bank belonged to the senior partner, T. B., and that on his death the surviving partners should have the option of purchasing his share of the business at its net value after providing for the liabilities of the business. The capital as appearing in the private ledger included the R. and S. estates, both freeholds; the legal estate of R. was in T. B. and the legal estate of S. was in T. B. and D. jointly, D. being a former partner.

In 1908 T. B. died, and by his will appointed P. and F. B. (his partners) and R. his executors, and devised and bequeathed to them all his real and personal estate upon trust for sale and thereout to pay his debts and testamentary and funeral expenses, and to hold the net balance upon trust for F. B.

At the death of T. B. the banking business was insolvent, its liabilities largely exceeded its assets, and he had no separate estate. The surviving partners concealed the insolvency of the bank by making false statements in their affidavit for probate of T. B.'s will, gave notice in February, 1909, to acquire the share of T. B., and continued to carry on the bank in the hope of restoring its solvency. By a deed dated April 29, 1912, the three executors of T. B., after reciting untruly that the debts of T. B. had been paid, conveyed as trustees to F. B. in fee simple the real estate of T. B., and by another deed dated April 30, 1912, after untrue recitals to the effect that T. B. at his death was absolutely entitled to the S. estate, the outstanding legal estate in S. was conveyed by D. to F. B. in fee simple. F. B. then mortgaged the R. and S. estates for 25,000*l.*, which sum was applied in reduction of the then overdraft of the surviving partners at their London agents. In negotiating the mortgage the title was deduced through T. B. and his will, the partnership deed and the insolvency of the bank not being disclosed. In 1914 the continuing partners became bankrupt, and at that date there were creditors of the bank who were creditors at the death of T. B. and were still unpaid. The trustee in bankruptcy sued the three executors of T. B. and the mortgagees, alleging that the R. and S. estates were part of the assets of the bank, that the deeds of

April, 1912, were fraudulent and void under the statute 13 Eliz. c. 5, and claiming priority over the mortgagees for the creditors of the bank:—

Held, that the legal estate in R. and S. passed by the deeds of April, 1912, and that the mortgagees, being entitled by the terms of those deeds to suppose the trusts of T. B.'s will were at an end, and having the legal estate and being purchasers for value without notice of the real facts, were unaffected by any antecedent equities of the creditors of the bank.

Perham v. *Kempster* [1907] 1 Ch. 373 distinguished.

Held, also, that the deeds of April, 1912, were not void under the statute 13 Eliz. c. 5, for they were not made with intent to defeat and delay the creditors of the bank, but with the object of carrying on the business and of paying them by that means.

Ex parte Mayou (1865) 4 D. J. & S. 664 distinguished.

Held, also, on the evidence, that the notice of February, 1909, was carried into effect, and that the two estates in question became assets of the surviving partners, who could deal with them.

The statement in Lindley on Partnership, 8th ed. pp. 400—401, that "in order that an agreement may have the effect of converting joint into separate estate, or vice versa, the agreement must be executed, and not be executory merely," explained.

In February, 1898, Thomas Bulteel, who then was carrying on the business of the Naval Bank at Plymouth as sole partner and was sole owner of the capital and assets of the business, took into partnership one Parker. At this date the capital and assets of the business, as appearing in the books of the bank, included two freehold properties, known as the Radford estate and the Scobbiscombe estate, the legal estate in Radford being vested in Thomas Bulteel and the legal estate in Scobbiscombe being vested in Thomas Bulteel and one Daubeny jointly. Daubeny was a former partner of Thomas Bulteel.

By a deed dated October 15, 1907, Thomas Bulteel and Parker admitted Frederick Bulteel, the son of Thomas Bulteel, into the partnership. Under the terms of this deed Parker and Frederick Bulteel were in the position of salaried partners, and the whole of the capital of the partnership belonged to Thomas Bulteel and consisted of "the amount appearing as the capital of the business in the private ledger of the bank on the 29th of September, 1907"; and clause 9 of the deed provided that on the dissolution of the partnership by the death of Thomas Bulteel the surviving partners or partner should be at liberty to purchase the share of Thomas

Bulteel upon giving his representatives within three calendar months of such dissolution a notice in writing of their intention so to do, and the sum to be paid for such shares should be the net value thereof after providing for the debts and liabilities of the business. In the said private ledger the Radford and Scobbiscombe estates were entered as part of the capital and assets of the business.

In October, 1908, Thomas Bulteel died, and by his will, after appointing Parker, Frederick Bulteel, and his son-in-law, Captain Richards, his executors and trustees, and after bequeathing a legacy of 500*l.* to his wife, the testator devised and bequeathed all his real and personal estate to his trustees upon trust for sale, and out of the proceeds thereof to pay his debts, testamentary and funeral expenses, and the legacy, and to hold the net balance upon trust for Frederick Bulteel absolutely. At the date of the death of Thomas Bulteel the bank was insolvent to the knowledge of the partners, and had been insolvent for many years. Its debts and liabilities largely exceeded its assets, and the Radford and Scobbiscombe estates really were part of the assets of the bank, and Thomas Bulteel had no separate estate. The two surviving partners, however, continued to carry on the business of the bank in the hope of restoring its solvency, and in order to conceal its insolvency they, as executors of Thomas Bulteel, made false statements as to his property in their affidavit for probate of his will; and by a document dated February 22, 1909, they gave notice under clause 9 of the partnership deed of October 15, 1907, to purchase the share of Thomas Bulteel in the partnership business, although such share was of no value.

By a deed dated April 29, 1912, and made between the three executors of Thomas Bulteel of the one part and Frederick Bulteel of the other part, and expressed to be supplemental to the said will of Thomas Bulteel, after reciting (contrary to the fact) that all the debts of the testator had been paid, and also reciting that the executors in pursuance of the trust for that purpose in the will contained had sold certain portions of the testator's real estate, and that Frederick Bulteel had requested the executors to convey to him all the real and leasehold estate devised and bequeathed to them, which the executors had agreed to do, the executors as trustees conveyed to Frederick Bulteel in fee simple all the unsold real and personal estate of the testator. The Radford and Scobbiscombe estates were intended to pass by this deed. By another deed dated April 30, 1912, after recitals (contrary to the fact) to the effect that Thomas Bulteel was at the date of his death absolutely entitled to Scobbiscombe in fee simple, and reciting the deed of April 29, 1912, the outstanding legal estate in Scobbiscombe was conveyed by Daubeny to Frederick Bulteel in fee simple.

By a deed dated October 29, 1912, and made between Frederick Bulteel of the one part and three persons, as mortgagees, of the other part, Frederick Bulteel as beneficial owner in fee simple conveyed the Radford and Scobbiscombe estates to the three persons by way of mortgage to secure the repayment with interest of the sum of 25,000*l.* then advanced by them to him, and this sum he applied in reduction of the then overdraft of the partnership at their London agents. In negotiating this mortgage the abstract of title submitted to the mortgagees deduced the title to the two estates through Thomas Bulteel and his will as his separate estate, the insolvency of the bank was not disclosed, and the partnership deeds of February, 1898, and October, 1907, and some other documents were omitted from the abstract, the solicitor acting for Frederick Bulteel having no knowledge of them or of the insolvency of the bank.

In 1913 the wife of Thomas Bulteel died. She had not been paid her legacy.

In August, 1914, the Naval Bank suspended payment, and in October, 1914, a receiving order was made against Parker and Frederick Bulteel, and in November, 1914, they were adjudged bankrupt. The plaintiff was the trustee in their bankruptcy, and in this action sued the bankrupts and Captain Richards, as the executors of Thomas Bulteel, and the mortgagees of Frederick Bulteel, and in his statement of claim alleged, amongst other things, that the notice of February 22, 1909, was never acted on and was in fact abandoned, that at the date of the deeds of April 29 and 30, 1912, Radford and Scobbiscombe were the property and were subject to the debts and liabilities of the bank, that the same two deeds were made by the bankrupts with intent to defeat and delay the creditors of the bank and were fraudulent and void, that sums amounting to 130,000*l.* were still due to creditors of the bank who were creditors thereof at the date of the death of Thomas Bulteel, that had the defendant mortgagees properly investigated the title to the mortgaged premises the true title would have been discovered and the insolvency of the bank would have been disclosed; and the plaintiff claimed (1.) a declaration that the Radford and Scobbiscombe estates were the joint property of the bankrupts and Thomas Bulteel at the decease of Thomas Bulteel as part of the assets of the bank; alternatively, that the same were the joint property of the bankrupts as part of the assets of the bank at the commencement of the bankruptcy; (2.) a declaration that the deeds of April 29, and 30, 1912, were void; and (3.) a declaration that he was entitled to priority over the mortgage of October 29, 1912, in respect of the premises therein comprised for payment of such of the debts of the bank as existed at the date of the death of Thomas Bulteel and were still unpaid.

The defendant mortgagees in their defence denied the allegations of the plaintiff and pleaded that they were purchasers for value without notice. The other material facts sufficiently appear in the arguments and judgment.

Captain Richards died before the trial of the action, and the proceedings were not continued against his estate.

Jenkins, K.C., and *Whitmore Richards*, for the plaintiff. The defendant mortgagees say that the two estates were either the separate estate of Thomas Bulteel, or can be dealt with on that footing, as their abstract of title shows that Frederick Bulteel had a good legal title free from incumbrances. Assuming that to be so, they have only a title to what Frederick was beneficially entitled to as residuary legatee under the will of Thomas Bulteel. But by that will there was an absolute trust for conversion to pay debts and a legacy, and until that trust was at an end Frederick Bulteel had no beneficial interest as residuary legatee; there could be no reconversion into realty and no election by him to take the properties as real estate. The mortgagees were dealing with a trustee beneficiary only four years after the death of the testator, who was to have the net surplus after the trust was performed. The mortgagees rely on the recital that the debts were paid, but that recital is false and contains no reference to the legacy which has not been paid, and the trust was not at an end, and they can only take subject to all pre-existing equities: *Perham* v. *Kempster* (1); *Howard* v. *Chaffer*. (2) The mortgagees may rely on *Storry* v. *Walsh* (3) and *Graham* v. *Drummond* (4), but they are distinguishable. In *Storry* v. *Walsh* (3) the residuary legatee was a stranger, and *Graham* v. *Drummond* (4) was not a case of legal estate but of equities. Here one of the trustees who represented that the debts were paid was an interested party taking a conveyance to himself, and his representation is unavailing. The only proper way for the mortgagees to get a title was to take a conveyance from the executors, qua executors. But in truth the real fact was that Thomas Bulteel had no separate estate. He was insolvent, his partners were insolvent, and the two estates were part of the assets of the bank for payment of its liabilities. It is said that the estates became the joint estate of the two surviving partners, and the notice of February, 1909, is relied on. Admitting that partners may convert joint estate into separate estate, and vice versa, the transaction must be bona fide, and must be completed before a subsequent bankruptcy: Lindley on Partnership, 8th ed. pp. 397, 400; *Ex parte Wheeler*. (5) We contend that the transfer was never effected either in form or substance because the executors treated the two properties as the separate estate of Thomas Bulteel. The point was raised in the bankruptcy on an application for directions by the trustee, and the county court judge decided that the estates were not the separate estate of Thomas Bulteel, but were part of the joint estate of the two surviving partners. On appeal a Divisional Court affirmed the county court judge on the first point, but held there was no evidence that the notice had been carried out and that the two estates remained the joint estate of the old firm. (6) We ask the Court to follow that decision. The notice was found in the safe at the bank at the commencement of the bankruptcy, and it is submitted that there is no evidence that it ever came to the knowledge of Captain Richards. But if it did, it was inoperative. Under the partnership articles the option was to purchase the share of Thomas Bulteel at its net value after payment of all the liabilities. But at his death there was nothing on which the option could operate, because all the partners were insolvent and the estates were assets of the bank, and the transaction embodied in the deeds of April and October, 1912, tended to defeat and delay the creditors of Thomas Bulteel and was fraudulent and void within the statute of 13 Eliz. c. 5: *Ex parte Mayou.* (1) But if the notice created a contract, the continuing partners gave no consideration for it, and it was also incomplete at the commencement of the bankruptcy, because at that date there were creditors for about 130,000*l.* of Thomas Bulteel who were still unpaid.

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(1) [1907] 1 Ch. 373, 380.

(2) (1863) 32 L. J. (Ch.) 686, 695, 702.

(3) (1854) 18 Beav. 559.

(4) [1896] 1 Ch. 968.

(5) (1817) Buck, 25.

(6) Unreported.

Lastly, it is submitted that on the abstract of title the mortgagees were put on inquiry, which if they had followed up would have given them notice of the true position.

P. O. Lawrence, K.C., and *Devonshire*, for the defendant mortgagees. The real question is whether the mortgagees have priority over the creditors of the bank. They have the legal estate, and the title deeds, and the receipt for the money advanced, and the plaintiff in order to succeed must prove (1.) that the property at the date of the mortgage was still the property of the old firm; (2.) that the deeds of April, 1912, and the mortgage were executed with intent to defeat and delay the creditors of the old firm; and (3.) that the mortgagees had actual or constructive notice of the fraudulent intent and of the insolvency of the firm; and unless he proves all three things he must fail. In the first place, admitting that the two estates were partnership assets at the death of Thomas Bulteel, they were not comprised in the trust for conversion in the will, and therefore there was no equity for the creditors or for a legatee under the will. The only persons who could deal with the properties were the executors of Thomas, in whom they were vested under s. 30 of the Conveyancing Act, 1881, and the two surviving partners, and they could deal with them as they liked, and the creditors had no lien or charge upon them. In either case, therefore, there was no prior equity, and the executors and the surviving partners could deal with the properties for the purpose of raising money to carry on the bank. They could do it either directly, qua executors, or by effecting a mortgage through Frederick Bulteel. It was quite immaterial how they put forward the paper title; the deeds of

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(1) 4 D. J. & S. 664.

April and October, 1912, were one transaction and a mere conveyancing device and machinery to carry out the scheme. Therefore the mortgagees got a good title from all parties who could deal with the properties, including Captain Richards, at a date when there were no prior existing equities. Therefore *Perham* v. *Kempster* (1) and *Howard* v. *Chaffer* (2) do not apply, and the deeds cannot be set aside except by proving that the transaction was fraudulent within the statute 13 Eliz. c. 5, and that the mortgagees had notice of the fraudulent intent, in which case *Ex parte Mayou* (3) would apply; but it is distinguishable. There the intention was to defeat particular creditors, but here the parties acted bona fide with the intention to carry on the business and pay the creditors. Further, it is submitted that at the date of the mortgage the estates were the property of the continuing partners. The decision of the Divisional Court is not binding here, because all the true facts were not before that Court. There was a bona fide agreement come to at the death of Thomas Bulteel between his executors and the surviving partners to convert all the assets of the old firm into the assets of the new firm, which was carried out by numerous subsequent deeds, and it was competent for the parties to make such an agreement: Lindley on Partnership, 8th ed. pp. 397, 399, 400; *Ex parte Walker* (4); *Ex parte Wood* (5); *Ex parte Cooper* (6); *Ex parte Peake* (7); *Ex parte Clarkson* (8); *In re Simpson.* (9) On the evidence we ask the Court to infer that the notice of February, 1909, was given to the executors, including Captain Richards. He certainly was a party to the scheme for raising money by the deeds of 1912, and during the four years prior to that date thirty-one conveyances were executed by the executors transferring assets of the old firm to the continuing partners, and most, if not all, of them contain the recital "it has been agreed that the assets of the late partnership shall become the assets of the new partnership," and good consideration was given for the agreement, because they undertook to pay the debts of the old firm: *In*

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(1) [1907] 1 Ch. 373.

(2) 32 L. J. (Ch.) 686.

(3) 4 D. J. & S. 664.

(4) (1862) 4 D. F. & J. 509.

(5) (1879) 10 Ch. D. 554.

(6) (1840) 1 Mont. D. & D. 358.

(7) (1816) 1 Madd. 346, 356.

(8) (1834) 4 Deac. & Ch. 56, 66.

(9) (1874) L. R. 9 Ch. 572.

re Johnson (1); and before the bankruptcy they did pay off 290,000*l.* of the old firm's debts. But even if the agreement was voluntary, it was not necessarily fraudulent within the statute 13 Eliz. c. 5: *Ex parte Mercer.* (2)

Lastly, the mortgagees had not either actual or constructive notice of the insolvency of the bank or of the carefully concealed scheme of the surviving partners.

Dighton Pollock, for the two bankrupts, took no part in the argument.

Jenkins, K.C., in reply.

Cur. adv. vult.

July 31. NEVILLE J. The Naval Bank at Plymouth had been carried on by a succession of private partnerships. It was of long standing and good repute. In 1908 Thomas Bulteel, the senior partner in the firm then carrying on the business, died leaving two partners, a gentleman of the name of Parker and his son Frederick Bulteel, surviving. By his will he appointed the two surviving partners and a Captain Richards executors, and devised and bequeathed to them all his real and personal estate upon trust to sell and out of the proceeds of sale to pay his debts and a legacy of 500*l.* to his wife, and to hold the balance in trust for his son Frederick. His will was in due course proved by the three executors and his real estate was sworn at 70,000*l.*, the particulars not being immediately given. It was stated in the affidavit that the value of his share in the business could not then be ascertained. By two corrective statements furnished later by Parker and Frederick the particulars of his unsold real estate were given. They consisted of what I will call the Radford estate and the Scobbiscombe estate. By an indenture of April 29, 1912, made between the trustees of the one part and Frederick of the other part, reciting that it was intended to be read as supplemental to the will and that the debts had been paid, the trustees at Frederick's request conveyed to him all the real and leasehold estate remaining unsold devised and bequeathed by the will. By an indenture of April 30, 1912, one Daubeny, in whom the legal title to the Scobbiscombe estate was outstanding, conveyed it to Frederick. In my opinion the legal estate both in the Radford and Scobbiscombe estates was intended to pass, and did pass, to Frederick under the last mentioned indentures. On May 1, 1912, application was made through a mortgage broker to the solicitors of the defendant mortgagees for a loan of 30,000*l.* upon the Radford and Scobbiscombe estates, and a mortgage for 25,000*l.* was ultimately arranged which was carried into effect by an indenture of October 29, 1912, made between Frederick Bulteel and the mortgagees. On completion the mortgage money was paid to Frederick or his agent and then into the account of the Naval Bank at their London agents. This account was at that time overdrawn to an amount in excess of the 25,000*l.* The business of the Naval Bank had from the death of Thomas Bulteel been carried on continuously by the surviving partners. In 1914 the firm became bankrupt, and the trustee in bankruptcy in this action challenges the title of the mortgagees.

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(1) (1881) 20 Ch. D. 389, 393.

(2) (1886) 17 Q. B. D. 290.

The title disclosed to the mortgagees was upon the lines I have indicated, but the real facts of the case were widely different. At the date of the death of Thomas Bulteel the business and the partners alike were insolvent, and the question arose what under the circumstances was to be done. It was decided to continue the business, it is said, and I think truly said, in the hope of ultimately restoring the solvency of the bank. It was obvious, however, that had the insolvency of Thomas Bulteel at the time of his death reached the ears of the customers of the bank the continuance of the business would have been rendered impossible. The measures I have referred to upon proving the will were devised for the purpose of concealing the insolvency. Although the legal estate of the Radford property was in Thomas and that of Scobbiscombe in Daubeny as surviving mortgagee with Thomas, they were in fact assets of the business, and under the partnership articles were the property of Thomas, but of course only upon liquidation of the liabilities of the firm, he as between himself and his partners being owner of all the capital but solely responsible for all its liabilities. Thomas Bulteel's estate was liable to all the creditors of the firm while the value of his share of the business was nil, the debts largely exceeding the assets.

The first point taken on behalf of the plaintiff was that the mortgagees, having taken title from a beneficiary under the will who was also a trustee, could be in no better position than the trustee himself and took subject to all antecedent equities, and the case of *Perham* v. *Kempster* (1) was cited as an authority for this proposition. I think *Perham* v. *Kempster* (1) is distinguishable upon the ground that in that case the trust was an existing trust, while in the present case, as the mortgagees were in my opinion entitled by the terms of the conveyances to Frederick Bulteel to suppose, the trusts of the will were at an end. If trustees convey to the cestui que trust upon the footing that the trusts are fulfilled, and the cestui que trust releases the trustees, the trusts are determined, and none the less because the beneficiary was one of the trustees; otherwise I fail to see how such a trust ever can be determined. I think in such circumstances a bona fide purchaser getting the legal estate from the beneficiary is unaffected by prior equities arising under the instrument of trust. He could not, and I think would not be bound to, ascertain whether the debts had been paid of which he has no notice. In my opinion the doctrines of conversion and reconversion and election do not apply to such a case. The sole question is whether the facts disclosed justified a conveyance by the trustees to the beneficiary. There might no doubt have been a question about the 500*l.* legacy if it had turned out to be unpaid and had been charged upon the property, but having regard to the real facts of the case this is not so. Another answer to the argument founded on the principle applied in *Perham* v. *Kempster* (1) is that here no equities attached to the trust disclosed. The title disclosed was in fact wholly fictitious. The property did not pass to the executors under the will of Thomas Bulteel, but by virtue of the provisions of the Conveyancing Act, 1881, s. 30. They were trustees for the surviving partners, who were entitled to liquidate the partnership affairs subject to a right in the executors of Thomas Bulteel to have the assets applied in discharge of the liabilities if the former were not converted into assets of the new firm. The mortgagees did not know their vendors in this character, but were only concerned with them in their character of trustees of the will. If a trustee holding property under one instrument of trust makes a fictitious title under another, it appears to me that, although a purchaser knew that he was dealing with a trustee, he could not be affected by equities arising

(1) [1907] 1 Ch. 373.

under a trust by which he did not know his vendor to be in any way affected.

The next point was this. It is said that upon the abstract itself the mortgagees had constructive notice of the true ownership of the property and of the insolvency of the bank and of the partners. [His Lordship then dealt with the abstract and the requisitions on the title and other evidence on this point, and held that constructive notice could not be imputed to the mortgagees.]

Another point raised on behalf of the plaintiff was that the conveyances of April 29 and 30, 1912, were made with intent to defeat and delay the creditors of Thomas Bulteel and were consequently void under the statute 13 Eliz. c. 5. It appears to me that there are two answers to this. First of all, that the whole device was directed to the carrying on of the business and the payment of the creditors by that means; and, secondly, that whatever the intent might have been, the mortgagees were bona fide purchasers for value without notice. In the case of *Ex parte Mayou* (1), which was relied upon by the plaintiff, it was held that there was no bona fides in the transaction. In the present case the intent was not to defeat and delay creditors, but if possible to pay them.

Before leaving the case I will deal with another point raised by the mortgagees. Under the articles of partnership the surviving partners had a right to purchase the assets upon notice in writing to the executors within three months from the death. Such notice was produced, and in the proceedings which ultimately came before a Divisional Court it was alleged by the trustee in bankruptcy and accepted by all parties that the notice had been duly given. Before me this was contested, and I think the point could be properly raised notwithstanding what had occurred in the other proceedings. It was argued that there was no evidence that Captain Richards ever knew of the notice. Captain Richards is dead, and whether he knew or not cannot be directly proved, but I think the true inference is that he did know. He was a party to conveyances conveying partnership property to the surviving partners which contained recitals that it had been agreed that the assets of the old firm should be transferred to the new. He must have known, I think, that the continuance of

(1) 4 D. J. & S. 664.

the business meant the payment by the new firm of the debts of the old, and when the present proceedings were commenced in his lifetime he pleaded that the notice had been duly given. It is said that he could not have supposed that the properties in question were assets of the old firm as he joined in the affidavit upon probate, and there is no reason to suppose him to have participated in the fraud. I agree that there is no ground for thinking he did participate, but I think it is not material. If the notice was given, the right to call for a transfer of all the assets arose. It was not a bargain made by the executors, but a bargain made by their testator which it was their duty to carry out. I think ultimately he probably did know. He expressed himself in approval of the "scheme" carried out in 1912, as appears by his letter of April 2, 1912. There is no reason to suppose that he did not then know what the scheme really was, namely, a method of raising money for the purpose of the business of the new firm out of property in equity belonging to them. I think, therefore, that the properties in question were assets of the new firm. It is said that the Divisional Court decided to the contrary and that I am bound to follow their decision. So far as I can judge from what is said in the judgments, if the learned judges who decided that case had had the facts before them that I have before me, namely, that thirty-one conveyances of property had been executed to transfer assets of the old firm to the new, and that several hundred thousand pounds of the debts of the old firm had been paid off by the new, they would have come to the same conclusion that I have. If I follow their judgments as a decision that upon the construction of the agreement something more was required to pass the assets than the mere giving of notice, still it would not follow that where the agreement has been nearly completed and the parties incapable of being restored to their original rights the executors would not have become trustees of the remaining assets for the new firm. The statement in Lindley on Partnership, 8th ed. pp. 400—401, that "in order that an agreement may have the effect of converting joint into separate estate, or vice versa, the agreement must be executed, and not be executory merely," does not, in my opinion, mean that what has to be done under the agreement must be entirely completed, but that nothing remains to be done to make the agreement operative. The passage is based on the case of *Ex*

NEVILLE J.
1916
PEARCE
v.
BULTEEL.

parte Wheeler (1), in which case a condition upon which the agreement depended had not been fulfilled. This is pointed out by the author on p. 397 with reference to the same case. The other cases cited in support of the proposition appear to me to turn upon the same question, namely, did anything remain to be done not to complete the transaction but to perfect the agreement to convert the estate? For these reasons it appears to me that the plaintiff is not entitled to any of the relief claimed by the statement of claim, and that the action must be dismissed with costs.

Solicitors for plaintiff: *Law & Worssam, for P. T. Pearce, Plymouth.*

Solicitors for defendants: *Johnson, Raymond-Barker & Co.*

H. L. F.

In re CITY OF GLASGOW LIFE ASSURANCE COMPANY.

SARGANT J.
1915
Nov. 23.
1916
May 16.

[1914 C. 095.]

Insurance (Life)—Deposit—Amalgamation—Dissolution of Vendor Company—Carrying over Deposit—Assurance Companies Act, 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 13.

Where an assurance company sells its business and assets to another assurance company, and the vendor company is dissolved and there are outstanding policies—such as paid-up policies—the holders of which have not novated with the purchaser company, the Court will not order the 20,000*l.* deposit of the vendor company to be paid out to or transferred simpliciter to the account of the purchaser company, but will order the fund to be carried over to a separate account of the purchaser company "in respect of the life assurance business of the" vendor company "now dissolved."

In re Popular Life Assurance Co. [1909] 1 Ch. 80 distinguished and explained.

The City of Glasgow Life Assurance Company (below called "the Glasgow Company") was incorporated by a special Act passed in 1861, its powers being extended by another Act passed in 1892. In 1913 the company was registered as an unlimited company under the Companies (Consolidation) Act, 1908.

The Scottish Union and National Insurance Company (below called "the Scottish Union") was incorporated by a special Act passed in 1878, its powers being extended by special Acts passed in 1886, 1892, and 1906. By its Act of 1892 the Scottish Union was empowered to make and carry into effect contracts for amalgamating with or purchasing or taking over the business or property of any company authorized to carry on any similar business.

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(1) Buck, 25.

Each of the two companies in 1910 lodged in Court securities representing the 20,000*l.* required by s. 2 of the Assurance Companies Act, 1909, to be deposited with the Paymaster-General for and on behalf of the Supreme Court.

In March, 1913, the two companies entered into a provisional agreement for the sale by the Glasgow Company to the Scottish Union of all the business, goodwill, and assets of the former company, the latter company agreeing to keep separate and distinct the life assurance and annuity fund of the Glasgow Company and to continue to hold that fund in trust for the protection and sole benefit of the policy-holders and annuitants of the Glasgow Company, subject to certain rights of the Scottish Union in part of the profits of the fund.

By an order of the Court of Session in Scotland dated October 16, 1913, the transfer was sanctioned in the terms of the provisional agreement and an addendum thereto.

In November, 1913, the Glasgow Company went into voluntary liquidation, and in December, 1913, its liquidators assigned all its assets to the Scottish Union, and in the following year a petition was presented by both companies to the High Court of Justice in England asking that the fund in Court to the credit of "Ex parte the City of Glasgow Life Assurance Company in respect of life assurance business" might be transferred to an account "Ex parte the Scottish Union and National Insurance Company in respect of life insurance business" and for payment of the income of the fund to that company.

After the petition had come on once and an order had been made on it as to the income and certain cash the Glasgow Company was dissolved by proceedings in accordance with s. 195 of the Companies (Consolidation) Act, 1908, and the petition was accordingly amended in several particulars, including the striking out of the Glasgow Company as a petitioner.

The petition was further amended by asking that the Glasgow Company's fund should be carried over to a separate account "Ex parte the Scottish Union and National Insurance Company in respect of life assurance business of the City of Glasgow Life Assurance Company now dissolved," and that until further order the interest on the fund should be paid to the Scottish Union.

The Glasgow Company had issued a very large number of life policies in which the premiums had after the amalgamation been paid to the Scottish Union, but the Glasgow Company had also issued a large number of paid-up life policies which were still outstanding, and in respect of which there could not for a considerable time be any novation.

1916. May 16. *W. R. Sheldon*, for the company. By arrangement with the Board of Trade the company does not now ask for a transfer of the fund to the company, but that it shall be carried to the account of the petitioning company earmarked as the Glasgow deposit, and then the dividends are to be paid to the petitioning company. That will keep the fund as one for the benefit in the first place of the Glasgow Company's policy-holders who have accepted policies in the petitioning company in lieu of their policies with the Glasgow Company.

[SARGANT J. When a life assurance company has transferred its business to another life assurance company, and a substantial number of its policy-holders have not accepted policies in the purchasing company, how can the former company properly take steps for its dissolution ?]

It is done in these cases, and was done in *In re Popular Life Assurance Co.* (1)

[SARGANT J. That struck me as a difficult case as reported, and on obtaining the papers in it from the Board of Trade I found the following statement in the petition : "Since the said date all the property, goodwill and assets of the Popular Company agreed to be sold to the United Provident Company have been duly handed over and transferred to the United Company in accordance with the said agreement with the exception of the said sum of 20,000*l.* (or the investments representing the same) deposited as aforesaid, and the

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(1) [1909] 1 Ch. 80.

United Company has undertaken the liabilities of the Popular Company on all policies issued by such company, and the United Company is now liable on the said policies in the same way as the Popular Company was liable thereunder, and the holders of such policies now pay their premiums to the United Company."]

The practice since the passing of the Assurance Companies Act, 1909, has been to treat the payment of premiums to the purchasing company as a novation of the contract with the policy-holders, but in the present case the fully-paid policy-holders do not pay premiums and have not in any other way novated. The Board of Trade are satisfied with the order now proposed to be made, namely, to carry over the investments representing the 20,000*l*. deposit to the credit of " Ex parte the Scottish Union and National Insurance Company in respect of life assurance business of the City of Glasgow Life Assurance Company now dissolved," and until further order to pay the interest on the investments to the National Bank of Scotland, Limited, to the account of the Scottish Union and National Insurance Company.

Austen-Cartmell, for the Board of Trade. There are two different steps in the amalgamation—one is the approval of the amalgamation and the other is directing payment out of the fund. The Scottish Court has approved the amalgamation and given, as between the vendor company and the purchasing company, a beneficial title to the latter in respect of this deposit, and the purchasing company now comes to get the deposit. But the Court will take care that the fund does not go out until all claims on it have been satisfied. That cannot be shown to have been done while there are outstanding policy-holders in respect of whose policies there has been no novation. The account has been so worded as to make it clear that the fund remains available for persons having claims in respect of the assurance business of the Glasgow Company.

Sargant J. The report of the case of *In re Popular Life Assurance Co.* (1) seems to go rather further than it should.

In the present case the petitioners, who are two life assurance companies, a vendor company and a purchaser company, were asking originally for the transfer out of Court of the 20,000*l.* deposit which had been paid in by the vendor company. It was shown that the vendor company, whether rightly or not, had purported to wind up its affairs and become dissolved under the Act. It was a case in which there had been an approval of the scheme of amalgamation. Further, it appeared that as regards a very large number of policies annual or other periodical payments had been made to the purchaser company, and with regard to those policies it was probable or certain that there had been, by reason of that payment, a novation of the contract with the policy-holder, so that the purchaser company became liable instead of and to the release of the vendor company. For s. 7 of the Life Assurance Companies Act, 1872, had ceased to be law, and a novation was therefore possible in that way. But beyond these policies the vendor company had issued a very large number of fully paid up policies, the consequence of which was that there had not been, and probably would not be for a very long time to come, a novation of these contracts between the original policy-holders and the vendor company.

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(1) [1909] 1 Ch. 80.

Under those circumstances it was suggested that the decision of Warrington J. in *In re Popular Life Assurance Co.* (1) applied, and that, the vendor company having actually been dissolved and there being no personal remedy at all against the vendor company, it necessarily followed that the remedy against the sum deposited in Court had also gone, and that therefore the purchaser company was entitled to have that fund transferred to it as the assignee of the vendor company without any provision at all being made for those fully paid up policies of the vendor company. I do not think that that view of the case is really right, or that Warrington J. meant to go to that extent. I have had the papers sent to me by the Board of Trade, and I find that, in the petition in that case, it was stated that the purchaser company there had undertaken the liabilities of the vendor company on all policies issued by such company and that the purchaser company had become liable on these policies in the same way as the vendor company was liable thereunder. I think it must have been on that basis that the order was made by Warrington J.

(1) [1909] 1 Ch. 80.

Of course it is familiar that the Court, at any time within two years of the dissolution of the company in a voluntary winding up, could put an end to the dissolution, and even apart from that it is clear again that the assets of the company which is voluntarily wound up cannot be transferred to a purchaser without providing not merely for present liabilities, but for future possible liabilities, such as covenants under leases and so on. Therefore, in such a case as this, as long as there are existing liabilities of a vendor company, it seems to me that it would not be right for the Court to direct the transfer of the assurance fund to the purchaser company free from these possible liabilities of the vendor company. Indeed, with regard to the fact that the vendor company has in terms been dissolved, I feel some doubt as to whether a company ought to be dissolved under the Act while there are liabilities of the company outstanding, and while there are assets of the company not got in, such as an assurance fund in Court. But, however that may be, the mere fact that the company has been dissolved may be rather an additional reason for keeping a particular asset of the company, such as the fund in Court here, to meet the liabilities of the creditors.

But, since the petition first came before me, a suggestion has been made by the Board of Trade which seems to me amply to protect those policy-holders who have not novated, namely, that the fund shall be carried to a special account which will on the face of it show that the fund is still applicable for meeting those liabilities in the possible, though perhaps very improbable, event of the policy-holders having to resort to it. Accordingly I make the order which has been asked for to that effect.

Solicitors: *Young, Jones & Co.; Solicitor to the Board of Trade.*

F. E.

In re PLATT.
SYKES *v.* DAWSON.

[1916 P. 873.]

SARGANT J.
1916
July 20, 21.

Will—Construction—Administration—Annuity—Payable out of Income of Settled Share—Right of Trustees to retain Surplus Income to meet Possible Deficiency in a Future Year.

Testator bequeathed one sixth share of his residuary estate to trustees upon trust out of the income thereof to pay to his widow during her life an annuity of 1000*l.* a year, and "subject thereto to permit the same share and the income thereof" to devolve under trusts therein declared or referred to in favour of the testator's son and daughter and their issue respectively:—

Held, that, according to the true construction of the will, so long as the annuity was being paid in full the trustees had no power to retain surplus income of a past year for the purpose of making good a possible deficiency in a future year.

ADJOURNED SUMMONS.

Frederick Platt, by his will dated January 22, 1904, bequeathed an annuity of 200*l.* to his wife during her widowhood, and, in the event of the death of his son A. J. F. Platt without leaving any son living at his death, bequeathed to her a further annuity of 500*l.*, and declared that both annuities should be charged upon and payable out of the income of his residuary estate before the same should be divided into six shares as thereinafter directed; and the testator specifically bequeathed certain preference shares and debentures in a limited company therein named to his trustees upon trust to pay the income thereof to his daughter Brenda Jeanette Bedwell during her life, and after her death upon trusts therein declared in favour of her issue, and in default of issue directed the same and the income thereof to sink into his residuary estate; and, after specifically devising certain real estate to his trustees upon trusts in favour of his son A. J. F. Platt and his sons in tail, the testator devised and bequeathed his residuary real and personal estate to his trustees upon trust to sell and convert the same into money, with power to postpone such sale and conversion for such period as his trustees should think proper, and out of the moneys to arise from such sale and conversion to pay his funeral and testamentary expenses and debts and legacies and to invest the net residue in trustee securities and to divide the investments thereinbefore directed to be made or authorized to be retained (therein called his residuary estate) into six equal shares, and to hold three of such six shares upon the trusts which would be applicable thereto if the same had arisen from the sale of his settled real estate, and as to one other sixth share upon trusts in favour of his son A. J. F. Platt during his life and after his death upon the trusts therein declared in favour of his children, and as to one other sixth share upon the same trusts in favour of his daughter Brenda Jeanette Bedwell and her issue as were declared concerning the specifically bequeathed preference shares and debentures in the limited company, and as to the remaining sixth share upon trust (in the events which happened) " out of the income of the same one sixth share to pay to his wife during her life an annuity of 1000*l.* in addition to any other annuity or annuities bequeathed to her by this my will or any codicil hereto, and subject thereto to permit the same share and the income thereof to devolve under the provision for accruer next hereinafter contained; And I declare that in case the trusts hereinbefore declared of any one or more of the three last mentioned one sixth shares of my residuary estate shall fail or determine the same share or shares and any additional share which may accrue and be added thereto by virtue of this present proviso and the income thereof respectively shall go and accrue by way of addition to the others or other of the same shares of my residuary estate and if more than one in equal shares and proportions and shall be held upon the like trusts and with and subject to the like powers and provisions, or as near thereto as circumstances will admit, but not so as to increase the annuity hereinbefore provided for my said wife in case the same shall become payable." The testator also authorized his trustees, in case at any time with a view to the due administration or distribution of his estate it should be deemed convenient so to do, to appropriate and retain a sufficient part of his residuary estate, or of the investments representing the same, for answering by the annual income thereof the annuities thereinbefore bequeathed or such of them as should for the time being be payable; and declared that, in case the income of the appropriated fund should at the time of appropriation be sufficient to satisfy the said annuities or any of them, such appropriation should be a complete satisfaction of the trust to provide for the same ; and that, in case the income of the appropriated fund should at any time and from any cause whatever prove insufficient to pay the said annuities or any of them in full, resort might be had to the capital thereof respectively from time to time to make good such deficiency, and the surplus income (if any) of the said fund from time to time remaining after payment of the said annuities should become applicable as income of his residuary estate ; and that as and when any of the said annuities should cease a corresponding part of the fund appropriated to answer the same should sink into his residuary estate.

The testator died in 1906, leaving his widow (who was his second wife) and children by his first wife him surviving. His son A. J. F. Platt died in 1912 leaving a son and two daughters.

The testator's residuary estate consisted largely of debentures and preference and ordinary shares in the limited company above referred to, which the trustees had retained. The dividend on the ordinary shares in this company had been reduced from 7½ to 5 per cent. since the war, but so long as the company continued to pay a dividend at that rate the income of the one sixth share in question was sufficient to pay the annuity and leave a surplus over, but if the dividend were passed or were further materially reduced there would be a deficiency. At the date when this summons was taken out it was apprehended that this would be the case, but the dividend had since been declared at the rate of 5 per cent.

The trustees had in hand moneys representing part of the surplus income of the one sixth share in past years, and took out this originating summons for the determination of the question whether, upon the true construction of the will, the surplus income arising in past years from the said one sixth share ought to be resorted to for the purpose of making good the said annuity in any year in which the income of such share was not sufficient for the payment thereof.

C. Gurdon, for the summons.

B. J. Leverson, for the widow. The one sixth share and the income thereof is given "subject to" the annuity, which is certainly a cumulative charge on the income and is probably also charged on the capital of the share: *In re Watkins' Settlement.* (1) Under these circumstances the trustees are entitled as a matter of discretion and administration to retain past income in their hands for the purpose of making the annuity secure in the future.

B. A. Hall, for Mrs. Bedwell and her children. So long as the annuity is being paid in full the trustees have no power under the terms of this gift to retain surplus income to meet a possible future deficiency. A clear trust is constituted of the surplus income so long as the annuity is actually paid. It is like the case of a receiver who so long as the interest on the mortgage is kept down is bound to pay surplus income to the mortgagor. There appears to be no authority directly in point. [He referred to *Harbin* v. *Masterman* (2) and *In re Rose.* (3)]

Stamp, for the children of the deceased son. The testator has created a complete trust in terms of the " income " of this share and no question of discretion on the part of the trustees arises. To hold up the payment of the surplus income would contradict the directions in the will, and if there were successive tenants for life in such a case it would introduce endless confusion.

B. J. Leverson in reply. The words " and the income thereof " added to the word " share " are common form and do not affect the true construction of the will, under which the annuity is a charge upon the entire income of the one sixth share.

[SARGANT J. referred to *In re Stevens.* (4)]

In the provisions of the will authorizing the trustees to appropriate a fund out of the entire residuary estate to answer the other annuities given by the will the testator expressly provides for the application of any surplus income arising from the appropriated fund as if it were income of his residuary estate. There is no similar provision relating to the annuity now in question, and that is an indication of intention in favour of the right of the trustees to retain this income.

SARGANT J. I feel great difficulty as to the true meaning of the will of the testator in this case, but I do not think that I should dissolve my difficulty by reserving my judgment. The question arises on the provision for the payment of the annuity of 1000*l.* which is directed by the testator to be paid to his widow out of the income of one sixth share of his residuary estate. The testator's widow was his second wife and not the mother of the two children provided for by the will. The testator directed his residuary estate to be divided into six shares, three of which are to be held as capital moneys arising from the sale of settled real estate. Another one sixth share is settled as personalty upon trusts in favour of the testator's son and his children. Another one sixth share is settled upon trusts in favour of the testator's daughter and her children, and the remaining one sixth share, in the events which happened, is to be held upon the following trusts: [His Lordship read the trusts relating to this share and continued:] The residuary estate of the testator consists mainly of securities and shares in a limited company, and while the ordinary shares pay anything like the dividend which they have paid in the past there is amply sufficient to pay the widow's annuity out of the income of this one sixth share; but in view of the circumstances now existing some doubt was felt whether for the current year any dividend or a dividend at a reduced rate of 2½ per cent. only would be paid, and in either of those events the income derived from the one sixth share would prove insufficient to pay the widow's annuity in full. That apprehension has not in fact materialized, and the company has paid a 5 per cent. dividend on its ordinary shares; but I think that I must take it that there is a reasonable probability of this not continuing to be the case, and that the income may hereafter prove insufficient to pay the annuity in full; and what is said on behalf of the widow is that the surplus income now in the hands of the trustees for the past year over and above the amount required to pay the annuity ought to be retained by them for the purpose of making good any deficiency of income in the future.

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(1) [1911] 1 Ch. 1.
(2) [1896] 1 Ch. 351.
(3) (1915) 113 L. T. 142.
(4) [1915] 1 Ch. 429.

It is quite clear that under the terms of the gift the annuity is not dependent upon the income of the one sixth share in any particular year—that is to say, the annuity is cumulative, to be paid out of the income of the share during the life of the widow; and I think, though I do not decide the point so as to bind the persons entitled in remainder, that the terms of the gift are such as, according to the most recent decisions on the subject, to charge the annuity on the corpus of the share, the gift over being made "subject thereto." It is quite certain, therefore, that, if there is a deficiency of income in any year, that deficiency would have to be made up at least out of any surplus in a subsequent year, and it is almost certain that at the widow's request it would have to be made up by a sale of a sufficient portion of the capital of the share. But it does not necessarily follow that the trustees are entitled to retain surplus income from a past year for the purpose of meeting a possible deficiency of income in a future year. I have to construe the language of the clause as it stands, and I am very much impressed by the fact that what is permitted to devolve under the accruer clause—in other words, what is given over to the settled shares of the son and daughter subject to the annuity—is the same share and "the income thereof." Now at any particular time when the trustees have to consider whether the income is to devolve between the son's and daughter's shares they are met with this difficulty, that it is to be "subject thereto," that is to the annuity. Does that mean subject as at the time of payment of the annuity, or does it mean subject to the satisfaction of the annuity down to the death of the annuitant? In my opinion the former is the true meaning of the language, and I think that the administration of the trust would be extremely complicated if any other view were adopted.

It is curious that, so far as I know, the point has never been decided. At any rate, no authority has been cited before me. But that rather tells against the claim of the annuitant, since if any such right had existed it would have been enforced from time to time by persons in the same position as herself. One reason may be that a fund to secure an annuity is generally so invested that the income of the fund is reasonably certain and not of a fluctuating character, though that does not entirely explain the absence of any authority upon the point. The annuitant will not be prejudiced, since, in the view which I take, she will be entitled to have capital sold to make good any deficiency in the annuity. It is true that in the circumstances realization may not be easy, but I do not think that I can take that consideration into account. Taking the analogy of a company with preference and ordinary shares, I have never heard of any suggested power in the company (apart from express provisions in the articles of association) to postpone the payment of a proper dividend on its ordinary shares for the purpose of providing for the payment of dividends on its preference shares in the future although those shares are cumulative. Mr. Leverson referred to a special power in the will to appropriate a sufficient part of the residuary estate to answer out of the income thereof the other annuities given to the widow by the will by which it is expressly provided that the surplus income shall be applicable as income of the residuary estate, but any argument derived from that clause seems to me to be of a somewhat double-edged character. The testator may have intended to draw a contrast between the annuities, or on the other hand he may only have indicated the course to be pursued with regard to them generally.

On the whole, though I feel great doubt on the point, I am of opinion that the income to accrue on this share of residue after satisfying the claims of the annuitant down to date ought to be distributed between the other shares as directed by the will. Of course, if the trustees should foresee a certain deficiency and should have surplus income in their hands, I do not intend to preclude them from applying this money to making good the annuity. As a matter of administration and of immediate adjustment they might make good the annuity out of any income in their hands. All that I decide is that they are not to retain or accumulate any surplus income for the purpose of making good a possible or contingent deficiency in a future year.

Solicitors: *Gadsden & Pennefather.*

A. C.

SARGANT J.

1916

June 27;
July 28.

In re HAWKINS.

WHITE *v.* WHITE.

[1915 H. 1776.]

Will—Construction—Trust for Maintenance of Daughter—Accumulation of Surplus Income for Term of Twenty-one Years—Surplus Income of Legacy after Expiration of Term to fall into Residue—Residue settled—Tenant for Life and Remainderman—Intestacy—Accumulations Act, 1800 (*Thellusson Act*) (39 *&* 40 *Geo.* 3, *c.* 98)—*Originating Summons—Employment of Leading Counsel.*

Testator bequeathed to trustees a sum of 10,000*l.* upon trust to provide out of the income thereof and of any accumulations thereof a sum sufficient for the maintenance of his daughter A. during her life, and to accumulate the surplus income for any period not exceeding the term of twenty-one years from his death, and to hold the accumulations on the like trusts as the original sum of 10,000*l.*, but with liberty to apply any such accumulations as if they were income arising in the then current year; and directed that all surplus income arising after the expiration of the said term and not so applied should fall into and form part of his residuary estate, and subject to the trusts aforesaid directed that the said sum of 10,000*l.* and the income thereof and the accumulations of income or so much thereof as should not have been so applied should be held on trusts in favour of the children of A., and in default of children should fall into and form part of his residuary estate. The testator bequeathed a second sum of 10,000*l.* on similar trusts in favour of his daughter B. and her children, with similar trusts in default of children; and gave his residuary estate upon trusts under which each of his daughters C. and D. took a life interest with a general testamentary power of appointment, with a trust in default of appointment for her statutory next of kin.

At the expiration of the period of twenty-one years the trustees had made certain accumulations of the unapplied income of each legacy of 10,000*l.*, and since that date the surplus income of the two legacies and of the past accumulations had also been accumulated by the trustees. All four daughters were still living. On a summons taken out for the purpose of ascertaining how such surpluses ought to be dealt with:—

Held, that, according to the true construction of the will, the surplus income of the legacies, after the expiration of the term of twenty-one years, was not given to the tenants for life of the residuary estate as income, but was to be added to the capital of the residuary estate and dealt with accordingly.

Held, also, that on this construction of the will the addition of the surplus income to the capital was in effect an accumulation within the provisions of the Thellusson Act, and that the will must be read as if this direction were eliminated.

In re Phillips (1880) 49 L. J. (Ch.) 198 and *In re Cababé* (1914) 59 Sol. J. 129 followed in preference to *Crawley* v. *Crawley* (1835) 7 Sim. 427, *O'Neill* v. *Lucas* (1838) 2 Keen, 313, and *In re Pope* [1901] 1 Ch. 64.

Held, also, that on this footing the surplus income of the original legacies after the expiration of the term of twenty-one years, and also the income of the accumulations made during the term of twenty-one years, were not undisposed of, but were properly payable to the tenants for life of the residuary estate.

In re Cababé on this point explained and distinguished.

Observations on the employment of leading counsel on the hearing of an originating summons.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment:—" This summons raises questions as to the destination of the surplus of income arising more than twenty-one years after the death of the testator from two legacies of 10,000*l.* settled for the benefit of his two daughters Emily Thomasine Hawkins and Ethel Rosalie Frances Hawkins respectively (hereinafter referred to as Emily and Ethel) and from accumulations of the surplus income of those legacies made during the period of twenty-one years from the testator's death.

" The testator, by his will dated November 28, 1885, gave his trustees a sum of 10,000*l.* to be invested and held upon trust to provide out of the income thereof and of any accumulations thereof a sufficient sum for the maintenance and benefit of his daughter Emily during her life and to accumulate the surplus income for any period or periods not exceeding the term of twenty-one years from his death, and to hold the accumulations on the like trusts as the original sum of 10,000*l.*, but with liberty to apply any such accumulations as if they were income arising in the then current year. And the testator directed that all surplus income arising after the expiration of the said term and not applied under the powers aforesaid should fall into and form part of his residuary estate; and subject to the trust aforesaid the testator directed that the said sum of 10,000*l.* and the investments and income thereof and the accumulations of income or so much thereof as should not have been applied should be held for the children of his daughter Emily

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who being sons should attain the age of twenty-one years or being daughters should attain that age or marry; and if no child of her being a son should attain the age of twenty-one years or being a daughter should attain that age or marry the testator directed, that, subject to the trusts thereinbefore declared in favour of her and her children, the said sum of 10,000*l.* and the investments and income thereof and all accumulations of income or the unapplied part thereof should fall into and become part of his residuary estate. And the testator gave his trustees a second sum of 10,000*l.* upon trusts in favour of his daughter Ethel and her children with a gift over in default of children corresponding in all respects with those declared of the first sum of 10,000*l.* in favour of his daughter Emily and her children and the gift over in default of children. And, after bequeathing to his son Sidney the sum of 4000*l.* and giving a sum of 10,000*l.* in trust for the benefit of each of his daughters Mary and Agnes and otherwise as thereinafter declared and making certain specific devises and bequests, the testator devised and bequeathed his residuary real and personal estate upon trusts for sale and conversion and investment as therein mentioned and to stand possessed of such investments (thereinafter designated his residuary estate) upon trust in case (as happened) his daughters Mary and Agnes should both be living at his death to divide the same in equal shares and stand possessed thereof respectively upon the trusts and subject to the powers for their respective benefit and other trusts thereinafter declared being trusts under which each such daughter took a life interest for her separate use without power of anticipation during coverture and had an absolute power of appointment thereover by will or codicil, and, in default of such appointment, the share was to go to the persons entitled under the statute as if she had died possessed thereof intestate and a widow. And the testator provided that in case either of his daughters Emily or Ethel (whom he described as being in delicate health and requiring additional care and attention) should recover so as to be competent to manage her own affairs, she should as from and after her recovery be placed as far as might be as regarded his residuary estate on an equal footing with the testator's daughters Mary and Agnes.

"The testator died on March 14, 1886, so that the period of twenty-one years from his death ended on March 14, 1907. The four daughters named in the will are all still living, the two on whom the residue is settled being the defendants Mrs. White and Mrs. Christie. The income of each of the two trust legacies of 10,000*l.* settled for the testator's daughters Emily and Ethel has proved to be more than was required for the maintenance and benefit of each daughter, and at the expiration of the term of twenty-one years there were accumulations of surplus income which amounted in the case of Emily's settled legacy to some 203*l.* 8*s.* 10*d.* New South Wales 4 per cent. stock, and in the case of Ethel's settled legacy to 1890*l.* 4*s.* 1*d.* like stock. Since the expiration of the term of twenty-one years the surplus income on the two legacies and past accumulations has continued to be accumulated, and amounted on July 20, 1915, in the case of Emily's legacy to a sum of 94*l.* 11*s.* 2*d.* Consols and a small sum of cash, and in the case of Ethel's legacy to the sum of 1052*l.* 0*s.* 9*d.* Consols and a small sum of cash. Recently the trustees have entertained doubts whether the surplus income from the expiration of the term of twenty-one years ought to be treated as capital or as income, and they accordingly took out the present summons for that purpose. The summons was at first framed as if these were the only two possible alternatives; but on its coming before me I thought it possible that an intestacy might have been created, and the summons has since been amended by the addition of one of the next of kin of the testator so as to enable the third alternative of an intestacy also to be considered."

F. K. Archer (for *A. H. Droop*, serving with His Majesty's Forces), for the trustees, argued the case on behalf of the remaindermen not yet in existence interested in the residuary estate. The first question arising on the construction of the will is whether the surplus income of each legacy during the remainder of the life of each legatee after the expiration of the term of twenty-one years becomes capital of the residuary estate or is given absolutely as income to the tenants for life thereof. The direction in the will is that the surplus income is to fall into and form part of the residuary estate, and the plain meaning of those words is that it is to be added to capital, the tenants for life of the residuary estate being entitled only to the income arising from such additional capital. On this construction of the will the next question is whether the direction is void under the Thellusson Act. (1) On behalf of the persons who will become entitled in remainder to the capital of the residuary estate I submit that the direction in no way infringes the provisions of the Thellusson Act. The testator was evidently aware of the provisions of the Act and expressly limits the accumulations to the term of twenty-one years from his death, and apart from all authority it is difficult to see how the direction that after the trust for accumulation has ceased the surplus income is to fall into the residue can amount to an accumulation directed by the will within the meaning of the Act. The point, however, is directly covered by authority in my favour: *In re Pope* (2), where Farwell J. referred to the definition of "accumulation" in the Oxford Dictionary—"The action or process of growing into a heap, or large amount. The growth of a sum of money by the continuous addition of the interest to the principal"—and followed *Crawley* v. *Crawley* (3) and *O'Neill* v. *Lucas* (4) and disapproved of the view of Malins V.-C. in *In re Phillips.* (5)

[SARGANT J. In *In re Pope* (2) there was no direction in the will that the income should fall into residue. The words of the statute are "wholly or partially." Is not a disposition of income under which the tenant for life of the residue only receives the income of the income a partial accumulation ?]

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(1) The Thellusson Act, 1800, after reciting that it was expedient that all dispositions of real or personal estates, whereby the profits and produce thereof were directed to be accumulated, and the beneficial enjoyment thereof was postponed, should be made subject to the restrictions thereinafter contained, enacted, by s. 1, "that no person shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil, or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated for any longer term than (inter alia) the term of twenty-one years from the death of any such grantor, settlor, devisor or testator, ... and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to be accumulated contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed."

(2) [1901] 1 Ch. 64.

(3) 7 Sim. 427.

(4) 2 Keen, 313.

(5) 49 L. J. (Ch.) 198.

No; by partial accumulation the statute refers to a definite proportion of the whole income, as for instance if the total income were 100*l.*, and 50*l.*, part thereof, were directed to be accumulated. [He also referred to *Morgan* v. *Morgan* (1), *Bryan* v. *Collins* (2), *In re Clulow's Trust* (3), *In re Whitehead* (4), and *In re Travis.* (5)]

The view taken by Malins V.-C. in *In re Phillips* (6) and by Neville J. in *In re Cababé* (7) is no doubt the other way, but the dictum of Malins V.-C. (for it was no more) was not necessary for the decision of the case before him and cannot be taken as altering the law stated in *Crawley* v. *Crawley* (8) and *O'Neill* v. *Lucas* (9): see Jarman on Wills, 6th ed. p. 389, n. (*u*). The same reasoning applies to the income of the accumulations, subject only to the right of the trustees to resort to the accumulations if required for the maintenance of the legatees.

Dighton Pollock, for the tenants for life of the residuary estate. As a question of construction of the will the direction that the surplus income is to fall into and form part of the residuary estate amounts to a direction to pay it to the persons for the time being entitled to the income of the residuary estate. The surplus income still retains the character of income though directed to fall into the residuary estate.

If, however, the Court should be against me on the question of construction, the result is still the same, since the direction to add the surplus income to the capital of the residuary estate is in effect a direction to accumulate within the meaning of the Thellusson Act. The authorities are no doubt conflicting, but I ask the Court to follow *In re Phillips* (6) and *In re Cababé* (7) in preference to *Crawley* v. *Crawley* (8), *O'Neill* v. *Lucas* (9), and *In re Pope.* (10) The will must therefore be read as if that direction were struck out; and the surplus income of each legacy is not undisposed of, but under the

(1) (1851) 4 De G. & Sm. 164.
(2) (1852) 16 Beav. 14.
(3) (1859) 1 J. & H. 639.
(4) [1894] 1 Ch. 678.
(5) [1900] 2 Ch. 541.
(6) 49 L. J. (Ch.) 198.
(7) 59 Sol. J. 129.
(8) 7 Sim. 427.
(9) 2 Keen, 313.
(10) [1901] 1 Ch. 64.

general law falls into the residue and goes as income to the tenants for life of the residuary estate, who would be the persons entitled thereto if no such accumulation had been directed: Jarman on Wills, 6th ed. p. 389. *In re Cababé* (1) is no authority for treating the surplus income of these legacies as undisposed of, since the decision of Neville J. really proceeded on the view that the income of the bank shares in that case was part of the income of the testator's residuary estate, in which case the next of kin of the testator took it as undisposed of income of residue.

G. H. Devonshire, for the next of kin of the testator. On the question of construction I support the argument that the surplus income becomes capital falling into what the testator describes as his residuary estate: *In re Palmer* (2), per Lindley L.J. On that assumption I also support the argument that the direction is void under the Thellusson Act: Lewin on Trusts, 12th ed. p. 96, par. 14, citing *Shaw* v. *Rhodes* (3); but in that case I contend that the surplus income is undisposed of and goes to the next of kin of the testator: *In re Cababé*. (1)

F. K. Archer in reply.

Cur. adv. vult.

July 28. SARGANT J. delivered a written judgment in which he stated the facts as above set out and continued: I have, of course, in the first place, to construe the will and then to consider the effect on it of the Thellusson Act. It has been strongly urged on me that the true construction of the gift of surplus income after the expiration of the term of twenty-one years is to give it to the tenants for life of the residuary estate as income; but I cannot accept this contention. The direction that the surplus income is to fall into and form part of the testator's residuary estate is in precisely the same terms as the ultimate gift of the capital of the accumulated fund on failure of the trusts in favour of the testator's daughter Emily and her children. And I think that this direction must mean that as and when after the expiration of the twenty-one years' term the income of the 10,000*l.* fund and of its accumulations during that term shall prove more than sufficient to maintain and benefit the testator's daughter Emily the surplus of such income is from time to time to be added to the capital of the residuary estate and to be dealt with accordingly.

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(1) 59 Sol. J. 129.

(2) [1893] 3 Ch. 369, 372.

(3) (1835) 1 My. & Cr. 135, affirmed in H. L. sub nom. *Evans* v. *Hellier* (1837) 5 Cl. & F. 114.

Now, on this construction of the will, is this addition of surplus income to the capital of the residuary estate an accumulation within the Thellusson Act ? On this point there has been a great difference of judicial opinion. *Crawley* v. *Crawley* (1) would seem to be based on the view that such an addition of income to capital was not an accumulation. And Farwell J. in *In re Pope* (2) has, in terms, decided that a simple addition of income to capital is not an accumulation either in ordinary parlance or within the Thellusson Act. On the other hand, Malins V.-C. in *In re Phillips* (3) took a diametrically opposite view. And in the comparatively recent case of *In re Cababé* (4) Neville J. has expressed his strong preference for the view of Malins V.-C. In this state of the authorities I am free to follow my own judgment, which is in favour of the view of Malins V.-C. and Neville J. Such a recurrent addition as this seems to me plainly to amount to an accumulation, though it is a simple accumulation only and not a compound accumulation. And, to my mind, the definition of accumulation from the Oxford Dictionary which Farwell J. has quoted in *In re Pope* (2) is in favour of this view of the meaning of the word rather than in favour of the view of Farwell J. Further, it should be noticed that the Thellusson Act speaks of either total or partial accumulation, and is in terms aimed at preventing too great a postponement of beneficial enjoyment. It seems to me that a piling up of the income of property—even though the income of the additions to the growing pile is left at liberty—is at least a partial accumulation, and that such a process results in the postponement of the beneficial enjoyment of property within the meaning of that Act, since I cannot think that property is beneficially enjoyed in any real sense if its income is hoarded and all that is left available for enjoyment is the income of the hoard. This being so, the will must be construed as if there were a mere elimination of the direction to add the surplus income after the twenty-one years to the settled residue :

(1) 7 Sim. 427.
(2) [1901] 1 Ch. 64.
(3) 49 L. J. (Ch.) 198.
(4) 59 Sol. J. 129.

Eyre v. *Marsden* (1); and the question then arises what is to become of this surplus income. If it were surplus income of residue it would undoubtedly belong to the next of kin. But, being only intermediate undisposed of income of a legacy, the persons for the time being entitled to the income of the residuary estate claim it as being income of a portion of the whole estate which has not been otherwise disposed of and so remains part of the income of the residue. On this point *In re Phillips* (2) is a decision in favour of the tenants for life of the residue, though perhaps not founded quite on the reasoning above suggested. On the other hand, *In re Cababé* (3), though appearing to be a direct decision to the contrary, does not prove to be so when the facts are sufficiently stated. For though on the statement in the report the bank shares in question appear to have been specifically given, it turns out from the statement of the will in the plaintiff's affidavit (which I have looked at) that they were, though specifically mentioned, given as a part of the general residue and were therefore residue for this purpose.

In my judgment the claim to this surplus income of the persons entitled to the income of the residuary estate is well founded. I think that, generally speaking, so far as a specific fund or a legacy is given out of or so as to diminish residue and some partial interest in such a legacy, whether of the nature of capital or of the nature of income, is undisposed of, that interest remains as or fails to be subtracted from or results to residue so as to augment the capital or the income for the time being of the residue. In such a case there appears to be nothing to change the character of the income or capital of the particular fund so left undisposed of. The case of *Fullerton* v. *Martin* (4) is nearly, if not quite, a direct decision on the point involved here, but with this difference, that in that case there was an effective gift of surplus to residue. Again, the tenant for life was held entitled to the intermediate income of contingent legacies in *Allhusen* v. *Whittell.* (5) Further, in *In re Grant* (6) it was held that annuities given generally must be paid out of the income

(1) (1838) 2 Keen, 564, 574.

(2) 49 L. J. (Ch.) 198.

(3) 59 Sol. J. 129.

(4) (1860) 1 Dr. & Sm. 31.

(5) (1867) L. R. 4 Eq. 295.

(6) (1883) 52 L. J. (Ch.) 552; 31 W. R. 703.

of residue although the effect might be to completely exhaust that income, but that as the annuities ceased to be payable the relief so given would enure for the benefit of the tenant for life for the time being ; and see *Gibbs* v. *Gibbs* (1) and *Scholefield* v. *Redfern.* (2) Here I cannot doubt that if the ultimate direction that each 10,000*l.* legacy with its accumulations should on the death of the primary beneficiary fall into the residuary estate had been omitted from the will, that would nevertheless have been the result, and that from that time forward the income thereof would go to the persons entitled to the income of the residue whether as tenants for life or as absolutely entitled. And, if this is so, I think that the like result must follow if that result is partially anticipated by a previous failure of part of the trusts of the income. I may add that the case of *In re Palmer* (3), which was cited to me, is quite different from the present case, and that the case of *In re Whitehead* (4), to which my attention has since been directed, is also not in point, since in that case it was a question of dealing with the income of a legacy not settled under the testator's own will, but belonging to the testator under a previous will.

So far I have dealt only with the surplus income after the twenty-one years on the original legacies. But I think that the surplus income after the same date on the accumulations of the legacies must be similarly dealt with on the broad ground that the accumulations are accessory to and follow the original fund.

In the result, therefore, I hold that the accumulations of surplus income of each legacy since March 14, 1907, and the surplus income since the same date of each legacy and of its accumulations prior to that date belong to Mrs. White and Mrs. Christie in equal shares, but, of course, subject to the right expressly given by the testator's will to his daughter Emily in the one case and his daughter Ethel in the other case as to the application of past accumulations for their benefit and to their respective rights in case of recovery or otherwise.

I should like to add that, although I received very considerable assistance from the counsel who argued this case, still I cannot help regretting that in a case such as this of extreme difficulty and involving considerable sums I should not have had the assistance of leading counsel. There is an unfortunate and, I think, growing tendency to deprive Courts of first instance of this aid in the case of originating summonses and all other business except motions and witness actions, and that although the decisions on such summonses often dispose of large sums of money and involve very difficult and complicated questions.

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(1) (1872) 26 L. T. 865.

(2) (1863) 2 Dr. & Sm. 173.

(3) [1893] 3 Ch. 369.

(4) [1894] 1 Ch. 678.

Solicitors: *Watkins, Baylis & Chidson.*

A. C.

SARGANT J.
1916
May 24, 25; *June* 9.

In re HELLIWELL.
PICKLES *v.* HELLIWELL.

[1915 H. 2713.]

Will—Construction—Gift to Nephews and Nieces and their Children—Inclusion of Children of Illegitimate Sisters.

By treating or naming definite individuals as relations of the testator when they are not strictly such, and by thereby indicating that he is using a word of relationship in a looser sense than its strict one, a testator may include in a general gift to relations of that class—such as nephews and nieces—not merely the specially named individual, but also other persons who are in a corresponding position.

G. H., the testator, directed the trustees of his will to pay certain legacies to named persons, including 100*l.* to "my sister B. R." (formerly B. H.). The will then directed the trustees to stand possessed of the residue of "my said trust estate upon trust for all or any of my nieces and nephews living at the death of the survivor of myself and my said wife, and the children or child then living of any then deceased nephew or niece of mine who being male attain the age of twenty-one years, or being female attain that age or marry, in equal shares as tenants in common," per stirpes. The will then said: "And I declare that J. R. F. the son of my sister M. W., and W. H. H. the son of my brother John H. shall be entitled to a share equally with my other nephews and nieces."

W. H., the testator's father, had married B. F., the issue of the marriage being Joseph H., John H., G. H. (the testator), and B. H. (the B. R. named in the will). Before the marriage B. F. had had two illegitimate daughters, M. F. (the M. W. named in the will) and S. F. Joseph H., John H., and B. H. all married and had legitimate issue, and John H. had also an illegitimate son, the W. H. H. named in the will. M. F. married, and had no lawful issue but a natural son, the J. R. F. named in the will. S. F. married and died leaving legitimate sons. The testator and his brothers and sisters were all brought up together as one family, and the sons of S. F. were treated by him as his nephews :—

Held, that there was sufficient context in the will to include amongst nieces and nephews the sons of S. F.

GEORGE HELLIWELL, by his will made in 1906, gave some furniture and a policy of life assurance to his wife, Sarah, and devised all his real estate and the residue of his personal estate to trustees, upon trust for sale and out of the proceeds to pay his funeral and testamentary expenses and debts, and to invest the residue thereof, thereinafter called " my said trust estate," and to pay out of the income thereof an annuity of 52*l*. to his wife for life. And testator directed that after her death his trustees should stand possessed of " my said trust estate " and the accumulated income thereof upon trust to pay to the trustees of a chapel 100*l*., " and upon trust to pay to my sister Betty Rushworth the sum of 100*l*." and upon trust to pay to four persons who were sisters and a brother of his wife the sum of 100*l*. in equal shares. The will then proceeded as follows : " And my trustees shall stand possessed of the residue of my said trust estate upon trust for all or any of my nieces and nephews living at the death of the survivor of myself and my said wife, and the children or child then living of any then deceased nephew or niece of mine who being male attain the age of twenty-one years, or being female attain that age or marry, in equal shares as tenants in common, but so that the children of any deceased nephew or niece, if more than one, shall take equally between them only the share which their parent would have taken if attaining a vested interest. And I declare that John Rushworth Feather, the son of my sister Mary Wright, and William Henry Hey, the son of my brother John Helliwell, shall be entitled to a share equally with my other nephews and nieces."

Testator died on July 28, 1906, and his widow died on April 18, 1915. The testator's father, William Helliwell, had married one Betty Feather, and there were issue of that marriage three sons, Joseph Helliwell, John Helliwell, and the testator, and a daughter, Betty Helliwell. But prior to that marriage the testator's mother, Betty Feather, had had two natural daughters, Mary Feather and Sarah Feather. Joseph Helliwell, John Helliwell, and Betty Helliwell all married and had legitimate issue. And John Helliwell also had a natural son, William Henry Hey. Mary Feather married, but had no legitimate issue. She had, however, a natural son, John Rushworth Feather. Sarah Feather married one John Nicholson and had three sons. The testator therefore had, first, a number of nephews or nieces in the strict and ordinary sense of the term; secondly, a nephew, William Henry Hey, as to whom the chain of relationship was broken by that nephew's personal illegitimacy; thirdly, three nephews, the Nicholsons, as to whom the chain was broken only by their mother's illegitimacy; and, fourthly, a nephew, John Rushworth Feather, as to whom the chain was broken both by his mother's illegitimacy and by his own personal illegitimacy. There was clear and uncontradicted evidence that Mary Feather and Sarah Feather were brought up with the testator and his legitimate brothers and sister as one family; that they resided with the testator until one went into domestic service and the other married; that they were on affectionate terms with the testator and were treated by him as relations and sisters; that as the testator prospered in business they and theirs assisted him from time to time, and that the children of Sarah Feather, after her marriage, were treated by the testator as his nephews; while as to John Rushworth Feather, the illegitimate son of Mary Feather, the evidence filed on another head of the summons showed that the testator treated him with great kindness and made great, if unsuccessful, endeavours to give him a good start in life. The testator appeared to have been more successful in life than the other members of the family, but this did not seem to have in any way affected the relations between him and them. He himself had no issue.

At the date of the testator's will it would seem, though this was not actually proved, that both his legitimate brothers and both his natural sisters were dead, and in the will itself his sister Betty, then Betty Rushworth, was the only collateral of the same generation as himself who was mentioned.

After the death of the testator's widow, the residue having become distributable, the trustees of the will took out an originating summons against John William Helliwell (legitimate son of Joseph Helliwell), the said Joseph Helliwell, Clara Pickles (legitimate daughter of Betty Helliwell and her husband Samuel Rushworth), John

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Rushworth Feather (the illegitimate son of Mary Feather), Arthur Nicholson (legitimate son of William Nicholson, who was a legitimate son of Sarah Feather and her husband John Nicholson), John Nicholson and Albert Nicholson (who were legitimate sons of James Nicholson, a legitimate son of Sarah Feather and her husband John Nicholson), and Joseph Nicholson (who was the legitimate brother of James Nicholson), raising, as the main question, whether, on the true construction of the will, the defendants Arthur Nicholson, John Nicholson, Albert Nicholson, and Joseph Nicholson were entitled to participate in the residuary estate of the testator as being nephews or the children or child of deceased nephews of the testator.

Manning, for the plaintiffs, stated the facts and the question raised by the summons.

H. Greenwood, for the first three defendants (legitimate nephews of the testator and a legitimate niece). Where there is a gift to "children," that means legitimate children unless the context of the will or the surrounding circumstances show that illegitimate children are intended to be included. The same rule applies to other relationships, including that of uncle and nephew: *Wilkinson* v. *Adam* (1); Vaughan Hawkins on Wills, 1st ed. p. 80; *Atkinson* v. *Anderson.* (2) If a so-called nephew is himself born in wedlock, that does not make him a relative if his parent is illegitimate. To constitute a nephew the relationship must be legitimate in every link of the chain with the testator. The Nicholsons, who were grandchildren of Sarah Nicholson, do not take by substitution the shares of their deceased fathers, because, although both they and their fathers were legitimate, their grandmother was only the natural sister of the testator. Nor does Joseph Nicholson take, although he is a legitimate son of Sarah.

[SARGANT J. referred to *Dorin* v. *Dorin.* (3)]

The fact that the testator believed persons to be legitimate when they were really illegitimate does not entitle them to take under words prima facie applicable only to legitimate relations. And mere conjecture that illegitimate relations were intended to be included is not sufficient: *In re Pearce.* (1) A gift to A., B., C., and D., and every other child of M. D., where A., B., C., and D. were illegitimate, was held to be insufficient to show that the words "other child" was intended to include other illegitimate children: *Mortimer* v. *West.* (2) The fact that the testator expressly includes W. H. Hey and J. R. Feather, who were both illegitimate, among his nephews points to the conclusion that unless expressly named those who were not nephews through some defect in the chain of legitimacy were not to take: *Meredith* v. *Farr* (3); *In re Smilter.* (4) There is not enough in the context or surrounding circumstances to show that the testator intended to include among his nephews the children of his natural sister, Sarah Nicholson. As there were persons who stood to the testator in the legitimate relationship of nephews, they sufficiently answered the description of "nephews," and therefore it is unnecessary, in order to satisfy the word "nephews," to let in nephews who or whose parents are illegitimate: *Hill* v. *Crook* (5); *In re Pearce.* (6)

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(1) (1813) 1 V. & B. 422.
(2) (1882) 21 Ch. D. 100.
(3) (1875) L. R. 7 H. L. 568.

Heckscher, for the defendants who were the descendants of Sarah Nicholson. Joseph Nicholson, a legitimate son of Sarah Nicholson, and the sons of William and James Nicholson (who were themselves legitimate sons of Sarah) are entitled to come in as nephews of the testator. There is enough in the context to include them, for the testator calls both Betty Rushworth, who was legitimate, and Mary Wright, who was illegitimate, his "sisters," without making any distinction between them. In including Hey and Feather as his nephews he is regarding their personal illegitimacy and not that of Feather's mother. He would not regard the Nicholsons in the same light, because they were the legitimate descendants of Sarah. If Mary Wright had had legitimate children, they could not have been excluded, as he had described her as his sister: *Hill* v. *Crook.* (7) In *Mortimer* v. *West* (2) there was nothing in the context to take the case out of the general rule. [He also referred to *Seale-Hayne* v. *Jodrell* (8) and *In re Corsellis.* (9)]

Cur. adv. vult.

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(1) [1913] 2 Ch. 674; [1914] 1 Ch. 254.

(2) (1827) 3 Russ. 370.

(3) (1843) 2 Y. & C. Ch. 525.

(4) [1903] 1 Ch. 198.

(5) (1873) L. R. 6 H. L. 265, 282.

(6) [1914] 1 Ch. 254, 259.

(7) L. R. 6 H. L. 265.

(8) [1891] A. C. 304, 309.

(9) [1906] 2 Ch. 316.

June 9. SARGANT J. The answer to the first and main question in this summons depends on whether there is a sufficient context in the will of the testator to include the legitimate descendants of one of his two illegitimate sisters in the class of persons who are to take his residue under the description of nephews and children of deceased nephews. That the testator intended these persons to take there can, I think, be no doubt. But the question still remains whether he has sufficiently indicated this intention by the words he has used in his will.

There was a curious diversity in the collateral relationships of the testator which are now in question. [His Lordship stated the facts as to the descendants, legitimate and illegitimate, of the testator's father and mother, as above set out, and also the facts as to the manner in which Mary Feather, her illegitimate son John Rushworth Feather, Sarah Feather, and the children of the latter were treated and regarded by the testator, and also as to the testator's legitimate brothers and natural sisters being dead at the date of the will, and continued :] By that will an annuity of 52*l.* a year was to be paid to his widow, and his residue accumulated during her life, and on her death he gave a legacy of 200*l.* to his sister Betty Rushworth and several legacies to his wife's relations and directed his trustees to stand possessed of the residue of his trust estate in the words following : [His Lordship then read the rest of the will, and continued as follows :]

The testator died on July 28, 1906, and his widow died on April 18, 1915, so that the capital of the estate now becomes distributable. The question now is whether there are included amongst the class to take not only the two persons expressly included, namely, the illegitimate son of the testator's legitimate brother and the illegitimate son of the testator's natural sister Mary, but also the legitimate descendants of the testator's natural sister Sarah.

Now, on looking carefully at the special words of inclusion here, it is, I think, fairly clear that the testator is intending in the case of John Rushworth Feather, as in the case of William Henry Hey, to cure the disqualification due to an individual illegitimacy, and is not directing his mind to any disqualification due to the illegitimacy, in the former case, of the legatee's parent. The illegitimacy of Mary, as well as that of Sarah, was an old story which had been kept in the

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background during the whole of the testator's life, though he was no doubt aware of it. And it seems to me that he deliberately ignores it in this clause of his will, and speaks of Mary Wright as his sister in as full a sense as that in which he speaks of John Helliwell as his brother. Further, by directing that the two named persons, John Rushworth Feather and William Henry Hey, shall take with his *other* nephews and nieces, he impliedly recognizes them as included in his view as members of the class of nephews and nieces. Accordingly he is obviously using both the word "sister" in relation to the parent of a nephew, and the word "nephew" itself, in a sense going beyond the strict legal meaning of the word, and as including in the case of the word "sister" a natural sister, and in the case of the word "nephew" a son of a natural sister. Were the question here whether legitimate children of Mary Wright formed members of the class to take, there could be but little doubt that it should be answered in the affirmative. And when once the words "sister" and "nephew" are shown to be used in a wider or looser sense than their strict legal meaning, it is difficult to limit them to one of the two natural sisters and her children only, quite apart from the antecedent improbability that the testator here should be intending to include the illegitimate child of Mary while excluding the legitimate children of Sarah. The fact that the latter are not expressly mentioned may well be explained by the view I have adopted that the testator was only expressly attempting to cure personal illegitimacy.

In fine, the case seems to me within *Hill* v. *Crook* (1) rather than within *Dorin* v. *Dorin* (2), because there is here in the will itself a context which shows that the testator is not using the words describing the class to take in their strict legal meaning, and it therefore becomes proper to consider, with the help of all the surrounding circumstances, what is the special sense in which he is using the words. And the cases of *In re Jodrell* (3) and *In re Corsellis* (4) both tend to support the conclusion to which I have come, as tending to show that by treating or naming definite individuals as relations who are not strictly such, and by thereby indi-

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(1) L. R. 6 H. L. 265.

(2) L. R. 7 H. L. 568.

(3) (1890) 44 Ch. D. 590; [1891] A. C. 304.

(4) [1906] 2 Ch. 316.

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cating that he is using a word of relationship in a wider or looser sense than its strict sense, a testator may include in a general gift to relations of that class not merely the specially named individuals, but other persons who are in a corresponding position.

Solicitors for plaintiffs: *Turner & Co.*

Solicitors for defendants: *Young & Co., for F. W. Butterfield, Keighley; Walker & Rowe, for Frederick Walker & Son, Halifax; T. H. Goodwin, for Wright & Atkinson, Keighley.*

F. E.

GILBERT *v.* GOSPORT AND ALVERSTOKE URBAN DISTRICT COUNCIL.

[1914 G. 474.]

SARGANT J.
1916
July 7, 11.

Practice—Costs—Action against Public Authority—Dismissal for Want of Prosecution by neglecting to give Notice of Trial—"Judgment"—Solicitor and Client Costs—Public Authorities Protection Act, 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*b*)—*Rules of the Supreme Court,* 1883, *Order* XXXVI., *r.* 12.

An order under Order XXXVI., r. 12, dismissing an action for want of prosecution because the plaintiff has not given notice of trial within the time specified for so doing, with costs to be paid by the plaintiff, is a "judgment" within s. 1 (*b*) of the Public Authorities Protection Act, 1893, entitling the defendant to costs as between solicitor and client.

THE plaintiff by his statement of claim alleged that he was the owner of a piece of land or wharf at Gosport bounded on its southern side by a low wall of stones; that in October, 1913, the defendant council wrongfully claimed an uninterrupted right of way on behalf of the public over the wharf, and in January, 1916, unlawfully cut down and removed a wooden post and notice board erected by the plaintiff, the latter warning the public against landing on the wharf or using the same for any purpose whatsoever; and that in March, 1914, the council dug up and removed the greater part of the remaining stones of the southern boundary wall. The plaintiff claimed (1.) a declaration that the land or wharf was his property and that no part of the same formed part of any highway or was subject to any public right of way or other right; (2.) an injunction against trespassing on the land or wharf; (3.) delivery up of the boundary wall stones, post, and notice board; (4.) damages; and (5.) costs.

The defendants delivered their statement of defence on April 24, 1914, and an amended statement of defence on November 27, 1914.

The plaintiff first became entitled to give notice of trial on April 28, 1914—that is to say, four days after delivery of the defence.

On November 11, 1915, the plaintiff not having given notice of trial, the defendants applied by notice for further directions that the action might be dismissed for want of prosecution, and on January 31, 1916, the following order was made in chambers:—"It is ordered that this action do stand dismissed out of this Court for want of prosecution, with costs to be taxed by the Taxing Master and to be paid by the plaintiff to the defendants, the plaintiff by his counsel undertaking that if the plaintiff or any person claiming title through him should hereafter successfully bring an action for similar relief to that claimed in this action, he shall pay to the defendants 21*l.* 2*s.* 3*d.*, being the amount expended by them upon repairs to the property in question in this action in pursuance of" an order in the action, "together with any further expenses properly incurred in repairs to the said property. And the costs of this application are to be costs in this action." The Taxing Master taxed the defendants' costs as between solicitor and client, holding that the case was within s. 1 of the Public Authorities Protection Act, 1893. (1)

In his objections to the taxation the plaintiff said: "It is submitted that the Act does not apply. The defendants, in order to bring themselves within the Act, must show that they have, in the words of the Act, obtained 'judgment.' It is submitted that the true meaning of this expression is a judgment which determines the rights of the parties. The result of the present action does not give any decision as to the merits, and (as appears upon the face of the order) the plaintiff is free to bring another action. . . . The defendants . . . . could have, if they wished, themselves set down the action for trial, and at one time proposed to do so, but decided not to take that course. The Public Authorities Protection Act is penal and notoriously oppressive in its application and should be construed strictly. The position in the present case is equivalent to the plaintiff having discontinued, and when the plaintiff discontinues the Act does not apply: *Smith* v. *Northleach Rural Council*." (1) He also referred to *Marks* v. *Sparling* (2) and *Shaw* v. *Hertfordshire County Council* (3), and concluded by saying: "The order could not be pleaded as res judicata."

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(1) Sect. 1 of the Act (56 & 57 Vict. c. 61) is, so far as material, as follows: "Where after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty or authority, the following provisions shall have effect: . . . .

"(*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

The Taxing Master overruled the objection, and the plaintiff took out a summons to review the taxation.

Warwick Draper, for the plaintiff. An order dismissing an action for want of prosecution is not a "judgment" within the meaning of s. 1 (*b*) of the Act of 1893. The whole section is of a penal nature, and must not be extended to any case not exactly covered by its language; and, therefore, s. 1 (*c*) has been held not to apply where what has happened amounts to a notice of discontinuance of an action: *Smith* v. *Northleach Rural Council*. (1) There is a well-known distinction between an order and a judgment: *Onslow* v. *Inland Revenue Commissioners*. (4) A judgment disposes of the questions involved once and for all, whereas this order, on the face of it, shows that the plaintiff may bring another action. Order XXXVI., r. 12, says that if the plaintiff does not set down the action for trial within a certain time the defendant may apply to have it dismissed for want of prosecution, and the Court or a judge may "order" it to be dismissed accordingly. It is true that in *North Metropolitan Tramways Co.* v. *London County Council* (5) it was held that where the defendant substantially obtains judgment, that brings the case within the Act, but there the action had been tried and dismissed. It has also been held that an order by consent dismissing an action is a "judgment" within s. 1 (*b*), but that the clause does not apply to the costs of an appeal: *Shaw* v. *Hertfordshire County Council.* (1) Although s. 1 (*b*) applies both to injunction actions and actions for damages, it does not apply to interlocutory applications: *Fielding* v. *Morley Corporation.* (2) Sect. 1 (*b*) does not take away the discretion of the judge to deprive a successful defendant of costs for good cause shown: *Bostock* v. *Ramsey Urban Council.* (3) That case was approved in Scotland in *Aird* v. *Tarbert School Board* (4), where a doubt was expressed whether s. 1 (*b*) had any application except in a case where the action had been pressed to a judgment on the merits. It is doubtful whether the Act of 1893 applies to a case where a claim for land is in question: *Cross* v. *Rix.* (5)

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(1) [1902] 1 Ch. 197.

(2) Unreported.

(3) [1899] 2 Q. B. 282.

(4) (1890) 25 Q. B. D. 465, 466.

(5) [1898] 2 Ch. 145.

The Act does not apply unless the matter is res judicata, and that is not the case here. [He also referred to *Chamberlain & Hookham* v. *Huddersfield Corporation* (6), Order LXV., r. 1, and the Annual Practice, 1916, p. 1212.]

J. M. Gover, for the defendants. The plaintiff cannot succeed on the ground that the Act does not apply to an action of this kind.

[He was stopped by the Court on this point.]

On the wording of s. 1 (*b*) of the Act the defendants have only to show that in the action they have obtained "judgment"; the Act says nothing about final judgment. There is no decision that the judgment must be one on the merits, and the only dictum to that effect is that of Lord Pearson in *Aird* v. *Tarbert School Board.* (7) That case, according to the later report (8), is really in our favour as showing that "judgment" must be read in its ordinary and popular sense. It is submitted that "judgment" includes any order which substantially disposes of the action. Sect. 100 of the Judicature Act, 1873, says that "'judgment' shall include decree" and that "'order' shall include rule," but it does not point out any difference between the two. Order XLII., r. 24, says that an order

(1) [1899] 2 Q. B. 282.

(2) [1899] 1 Ch. 1.

(3) [1900] 2 Q. B. 616.

(4) 1907 S. C. 305; 44 S. L. R. 26, 223.

(5) (1912) 29 Times L. R. 85.

(6) (1901) 18 Rep. Pat. Cas. 454.

(7) 44 S. L. R. 26, 28.

(8) 1907 S. C. 305; 44 S. L. R. 223.

may be enforced in the same manner as a judgment to the same effect. In *Onslow* v. *Inland Revenue Commissioners* (1) it is said that "a 'judgment' is a decision obtained in an action, and every other decision is an order." Order LVIII., r. 3, provides that the length of notice of appeal shall be the same in the case of "any judgment, whether final or interlocutory, or . . . . a final order"; and Order LVIII., r. 15, states the time for appealing "from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action." An order dismissing an action as frivolous and vexatious is, for the purposes of appeal, an interlocutory order. Order XL. deals with motions for judgment, which do not necessarily terminate the action. Order XXXVI., r. 32, provides for judgment dismissing an action where the plaintiff does not appear at the trial—a default very similar to default in prosecuting an action—and in *Armour* v. *Bate* (2) the proper form of judgment is pointed out. Order XIII., r. 5, shows that there may be interlocutory judgments. Order XXXVI., r. 12, says that on an application to dismiss an action for want of prosecution because the plaintiff neglects to give notice of trial "the Court or a judge may order the action to be dismissed accordingly." In *Fielding* v. *Morley Corporation* (3) it was held that s. 1 (*b*) of the Act of 1893 applied to the dismissal of an action, without the Court saying that the dismissal must be by a judgment. There is no case which decides that a judgment or order under the rules as to interlocutory proceedings is not a judgment within s. 1 (*b*) of the Act of 1893; the nearest case to this is *Shaw* v. *Hertfordshire County Council* (4), where an order in chambers by consent that an action be dismissed was held to be a judgment. In *Smith* v. *Northleach Rural Council* (5) the question whether an order was a judgment was not decided; the decision there was really as to the effect of a notice of discontinuance under Order XXVI., r. 1. An order under Order XXXVI., r. 12, kills the action as much as any judgment could: *Whistler* v. *Hancock* (6)—a case which has been often followed: Yearly Practice, 1916, p. 359.

As to the matter not being res judicata, a judgment by consent or default is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case: *In re South American and Mexican Co.* (1) [He also referred to the Annual Practice, 1916, p. 427; *Fox* v. *Star Newspaper Co.* (2); *In re Orrell Colliery and Fire-Brick Co.* (3); and *Magnus* v. *National Bank of Scotland.* (4)]

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(1) 25 Q. B. D. 465, 466.

(2) [1891] 2 Q. B. 233.

(3) [1899] 1 Ch. 1, 4.

(4) [1899] 2 Q. B. 282.

(5) [1902] 1 Ch. 197.

(6) (1878) 3 Q. B. D. 83.

Draper, in reply, referred to *Ex parte Chinery.* (5)

SARGANT J. This is an application by the plaintiff to review the taxation of the defendants' costs, and the main question involved is whether the defendants are entitled to costs as between solicitor and client having regard to the Public Authorities Protection Act, 1893.

The action was brought in respect of an alleged trespass by the defendants on land said to belong to the plaintiff, but over which the defendants on behalf of the public claimed a right of way. The action went on for some time, and the defendants put in their defence, and, as the plaintiff did not give them notice of trial, they applied for and obtained an order dismissing the action, for want of prosecution, with costs to be paid by the plaintiff. [His Lordship read the order and s. 1 (*b*) of the Public Authorities Protection Act, 1893, and continued as follows:]

I have to consider whether the order dismissing the action is a "judgment" within the meaning of that word as used in s. 1 (*b*) of the Act. There is no question that the order finally and absolutely disposes of the action as between the plaintiff and the defendants. Probably the plaintiff could bring another action, but whether he could do so or not is not of much importance; this action is ended by the order to dismiss. Mr. Draper, however, contends that the order is not a judgment within s. 1 (*b*) of the Act.

In *Fielding* v. *Morley Corporation* (6) Lindley M.R., in delivering the judgment of the Court of Appeal, said that s. 1 of the Act applied to all actions, including what used to be called "suits in Chancery." Then he said "It applies to injunction actions as well as to actions for damages; and the dismissal of an action, which is the common

(1) [1895] 1 Ch. 37.
(2) [1900] A. C. 19.
(3) (1879) 12 Ch. D. 681.
(4) (1888) 57 L. J. (Ch.) 902.
(5) (1884) 12 Q. B. D. 342.
(6) [1899] 1 Ch. 1, 4.

form in the Chancery Division, is equivalent to judgment for the defendants."

In the present case the order is one which in terms is equivalent to a judgment for the defendants. Further, it is clear that to be within the section it is not necessary that the matter should have been the subject of adjudication, for in *Shaw* v. *Hertfordshire County Council* (1) the Court of Appeal held that an order in chambers by consent dismissing the action was a judgment within the meaning of the section. And *Armour* v. *Bate* (2) shows that, where a plaintiff does not appear at the trial but the defendant does, the latter is entitled to judgment dismissing the action for default of the plaintiff's appearance at the trial, subject to this, that the judgment may be set aside on terms. Is there any difference in substance between such a judgment and the order made in this case? I think not.

It is sufficient if in substance, although not in form, the defendant obtains judgment, and it is not necessary that the judgment itself should show on the face of it that the action was one falling within the Act: *North Metropolitan Tramways Co.* v. *London County Council.* (3) In my judgment the defendants have in substance recovered judgment against the plaintiff, and none the less so because this is due to the fact that the plaintiff has not thought fit to continue to prosecute his action to trial.

A case which has given me some trouble is the decision of Farwell J. in *Smith* v. *Northleach Rural Council.* (4) There the defendants in an action for damages on several issues paid money into Court in respect of one issue with a denial of liability, and the plaintiff "proceeded with" the action, but ultimately accepted the sum paid in in satisfaction of all the issues, and it was held that the plaintiff must pay defendants their costs of the discontinued issues up to the date of payment and all their subsequent costs, but that defendants were not entitled to solicitor and client costs from the date of payment in, as s. 1 (*c*) of the Act of 1893 was confined to cases where the action was "proceeded with" to judgment, and did not apply to a discontinuance under Order XXVI., r. 1, where money was paid in under Order XXII. with a denial of liability and not in satisfaction. But in that case Farwell J. was not drawing a distinction between orders and judgments; he was considering the difference between cases where money had been paid into Court in satisfaction of liability and cases where money had been paid in with a denial of liability, and he decided that s. 1 (*c*) of the Act of 1893 only applied to the former and not to the latter cases. The acceptance by the plaintiff of the money in Court amounting to a discontinuance of the issues in respect of which the money had not been paid in, the learned judge had to consider the rule as to costs in case of notice of discontinuance, which of course was binding on him, and he says: "The effect of the notice is to put an end to the action, wholly or in part, as the case may be, and no order of the Court is necessary for the purpose: the defendant does not 'recover' anything by any judgment or order of the Court, but by virtue of the notice; and, in my opinion, the word 'recover' in clause (*c*) means 'recover by judgment,' including a consent order, having regard to *Shaw* v. *Hertfordshire County Council.*" (1) He had to consider the case of costs given by a notice under one of the Rules of Court and not that of costs given by an order of the Court. It is true, as Mr. Draper said, that in that case Farwell J. did rely on the particular words of s. 1 (*c*) as not including a case where the costs were given by virtue of a notice. I entirely accept that, but as regards s. 1 (*b*) it seems to me that the word "judgment" in that clause includes such an order as the defendants have obtained in this case.

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(1) [1899] 2 Q. B. 282.
(2) [1891] 2 Q. B. 233.
(3) [1898] 2 Ch. 145.
(4) [1902] 1 Ch. 197, 201.

I am much obliged for the able arguments of counsel on both sides.

Solicitors for plaintiff: *Fraser & Christian, for B. J. Gilbert, Portsmouth.*

Solicitors for defendants: *Mills & Morley, for E. Talbot Palmer, Gosport.*

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(1) [1899] 2 Q. B. 282.

F. E.

In re MOXON.

[1916 M. 615.]

SARGANT J.
1916
July 26, 27;
Oct. 13.

Trustee—Public Trustee—Appointment as New Trustee—Direction in Trust Instrument that Number of Trustees shall not be Less than Three—Ability of Donee of Power to appoint Public Trustee as Sole Trustee—Trustee Act, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 10—*Public Trustee Act,* 1906 (6 *Edw.* 7, *c.* 55), *s.* 5.

Persons having the statutory power to appoint new trustees may appoint the Public Trustee to be sole trustee although the trust instrument expressly provides that upon any appointment of new trustees the number is not to be reduced below three.

JAMES EDWARD MOXON, by his will dated April 24, 1883, made some absolute bequests and gave certain securities upon trusts in favour of his wife for life or widowhood, and subject thereto in favour of his two children. After other legacies the testator gave his residuary estate to his wife, Louisa Moxon, his son Alfred Edward Moxon, and Eliza Georgiana Moxon, their heirs, executors, administrators, and assigns, upon trust that they and the survivors and survivor of them and the heirs, executors, and administrators of such survivor, their, his, or her assigns, should hold the same upon certain trusts which were subsisting at the date of the summons below referred to. The will contained the following clause: "And I hereby declare that the power of appointing a new trustee or trustees of this my will shall be exercised by my said wife during her widowhood, and in case of her remarriage then by my said wife and the surviving or continuing trustees or trustee, and after her death by the surviving or continuing trustees or trustee, or by the last retiring trustees or trustee, and upon any such appointment the number of trustees may be augmented or reduced so that the number be not raised above four or reduced below three."

Testator died in 1890, and Louisa Moxon died in 1915. Alfred Edward Moxon and Eliza Georgiana Moxon, the surviving trustees, took out an originating summons under Order LV. r. 3, of the Rules of the Supreme Court, 1883, and under ss. 25, 35, and 38 of the Trustee Act, 1893, against Margaret Louisa Moxon (a beneficiary under the trusts), raising the question whether the applicants had power to appoint the Public Trustee sole trustee of the will in the place of the applicants, who desired to retire from the trusts thereof. The Public Trustee was subsequently made a party to the summons, in order that the question might be argued on his behalf.

The summons was adjourned into Court and heard on July 26 and 27, 1916.

Romer, K.C., and *B. A. Hall*, for the applicants. Sect. 10, sub-s. 1, of the Trustee Act, 1893, gives power to certain persons to appoint a new trustee or trustees in the place of a trustee who is dead, or out of the United Kingdom, or desiring to be discharged, or refusing or being unfit or being incapable of acting; and by sub-s. 2 (*a*), on the appointment of a new trustee the number of trustees may be increased. But by sub-s. 2 (*c*), " except where only one trustee was originally appointed, a trustee shall not be discharged under this section from his trust unless there will be at least two trustees to perform the trust." And by sub-s. 5, on which the Public Trustee will rely, " this section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained." So that, unless there had been originally one trustee only, or an express enabling direction, the applicants could not have appointed a private person to be sole trustee. And s. 11 prevents a trustee from being discharged so as to leave only one trustee, unless a contrary intention is expressed in the trust instrument.

But these restrictions do not apply where the Public Trustee is appointed. By s. 5, sub-s. 1, of the Public Trustee Act, 1906, the Public Trustee " may be appointed to be trustee of any will or settlement or other instrument creating a trust . . . . whether the will or settlement or instrument creating the trust . . . . was made or came into operation before or after the passing of this Act, and either as an original or as a new trustee, or as an additional trustee, in the same cases, and in the same manner, and by the same persons or Court, as if he were a private trustee, with this addition, that, though the trustees originally appointed were two or more, the Public Trustee may be appointed sole trustee." So that, as regards the Public Trustee, this makes an exception to the provisions of s. 10, sub-s. 2 (*c*), of the Act of 1893.

Another exception in favour of the Public Trustee is made by s. 5, sub-s. 2, of the Act of 1906, which says that "where the Public Trustee has been appointed a trustee of any trust, a co-trustee may retire from the trust under and in accordance with section 11 of the Trustee Act, 1893, notwithstanding that there are not more than two trustees, and without such consents as are required by that section." It is obvious from this section that the Legislature had no objection to the Public Trustee being or remaining the sole trustee. Then s. 5, sub-s. 3, of the 1906 Act says: "The Public Trustee shall not be so appointed either as a new or additional trustee where the will, settlement, or other instrument creating the trust or duty contains a direction to the contrary, unless the Court otherwise order." But that only means that a testator or settlor may forbid altogether the appointment of the Public Trustee, and here the testator did not and could not forbid such an appointment, as there was then no such official in existence. The final words of sub-s. 1 of s. 5 were definitely aimed at the particular case of the Public Trustee being appointed in the place of two or more trustees, since under the existing law, and apart from statutory powers, in the alternative case of there being no trustee the Public Trustee could under the existing law be appointed as the sole trustee although the original trustees had been two or more: *In re Cunningham and Bradley's Contract for Sale to Wilson* (1); *West of England and South Wales District Bank* v. *Murch.* (2) The Public Trustee can only succeed by showing that the appointment is forbidden by s. 10, sub-s. 5, of the Trustee Act, 1893, but we say that s. 5 of the Act of 1906 is not an extension or modification of s. 10 of the former Act, but a separate and independent statutory power. And in *In re Leslie's Hassop Estates* (3) there is the following dictum of Eve J.: "I think under the combined effect of s. 10 of the Trustee Act, 1893, and s. 5 of the Public Trustee Act, 1906, the donee of the power in a settlement framed as this one is could himself appoint the Public Trustee to be sole trustee"; and he says he thinks that s. 10, sub-s. 5, must "be read as qualified by s. 5 of the later Act when the appointee is the Public Trustee." Subject to the restrictions imposed by sub-ss. 3 and 4, sub-s. 1 of s. 5 of the Act of 1906

(1) [1877] W. N. 258.
(2) (1883) 23 Ch. D. 138.
(3) [1911] 1 Ch. 611, 615.

enables the Public Trustee to be appointed in all cases as the sole trustee.

Sheldon, for the Public Trustee. The Act of 1906 does not permit the Public Trustee to be appointed sole trustee when the trust instrument says that the trustees must be two or more in number. Sect. 10 of the Act of 1893 is incorporated with s. 5 of the Act of 1906, and only brings the Public Trustee within the scope of the former section so as to enable him to be appointed under s. 10; and any appointment of him under that section is subject to the restrictions contained in it. That being so, the Public Trustee cannot be appointed sole trustee where the testator has expressed a "contrary intention" within the meaning of s. 10, sub-s. 5, of the Act of 1893 by saying that the number of trustees shall be not less than three. The Public Trustee's appointment can be prohibited without specifying him. Then s. 11, sub-s. 1, of that Act only allows the discharge of a trustee where there are more than two trustees.

[SARGANT J. That sub-section is altered, in the case of the Public Trustee, by s. 5, sub-s. 2, of the Act of 1906.]

Secondly, the prohibition in the will that the number of trustees shall not be reduced below three is a "direction to the contrary" within sub-s. 3 of s. 5 of the Act of 1906. That Act applies whether the trust instrument came into operation before or after the passing of the Act. [He also referred to s. 31 of the Conveyancing Act, 1881, and s. 39 of the Settled Land Act, 1882.]

Romer, K.C., in reply.

Cur. adv. vult.

Oct. 13. SARGANT J. This summons raises the important question whether persons having the statutory power of appointing new trustees of a will can appoint the Public Trustee as the sole trustee of the will notwithstanding that the will contains a provision that upon any appointment of new trustees the number is not to be reduced below three.

In the case of *In re Leslie's Hassop Estates* (1) Eve J. has expressed a clear opinion in favour of such an appointment. But the actual decision in that case was merely that the Court could make such an appointment, and the relevant statutory provisions are not precisely the same in the case of an appointment by the Court as in the case of individual appointors.

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(1) [1911] 1 Ch. 611, 615.

Here the persons proposing to make the appointment are the retiring trustees themselves. And, inasmuch as both they and the beneficiaries under the will are desirous that the appointment should be made, there has been some difficulty in securing an effective argument against the proposed appointment. But by arrangement the Public Trustee has been served with the summons, and Mr. Sheldon on his behalf has assisted me by pointing out very effectively such objections as there are to the appointment. Though I have not been convinced by his arguments, yet, out of respect to them and because of the general importance of the question, I have thought it well to put the reasons for my judgment into writing.

Mr. Sheldon's objections were two in number. The first was that on its true construction s. 5 of the Public Trustee Act merely brings the Public Trustee within the scope of the statutory powers contained in s. 10 of the Trustee Act and enables his appointment under that section; that accordingly any such appointment of the Public Trustee is subject to all the restrictions of s. 10, including those in sub-s. 2 (*c*) and sub-s. 5; and that in the present case these last restrictions clearly prohibit the appointment now proposed. I am, however, of opinion that the first link in this chain of reasoning is defective. It seems to me that s. 5 of the Public Trustee Act, 1906, is not merely by way of addition to the statutory powers, but is a positive and independent enactment enabling the appointment of the Public Trustee on every occasion on which a private trustee could be appointed. For instance, after as well as before s. 5 of the Trustee Act, 1893, or its legislative predecessors, such as s. 31 of the Conveyancing Act, 1881, s. 5 of the Conveyancing Act, 1882, and s. 6 of the Conveyancing Act, 1892, there are cases in which the power of appointing new trustees rests entirely on the provisions of the will or settlement in question and is wholly independent of any statutory power. And the language of s. 5 of the Public Trustee Act, 1906, obviously allows the appointment of the Public Trustee in these cases, as well as in the cases governed by the general legislation. It is true that the occasions of appointment, the manner of appointment, and the persons appointing are to be the same in the case of the Public Trustee as in the case of any other trustee. But this was in the main necessary to prevent conflict or overlapping ; and in any case the use of referential words of this kind is sufficiently explicable by reasons of convenience, and is not of itself enough to convert into a mere modification or extension of the statutory power that which is otherwise expressed as being a power separate from and independent of the statute.

Indeed, though it may not be necessary to go so far in this particular case, I am inclined to adopt the broad general view suggested by Mr. Hall, that (subject of course to the restrictions imposed by sub-ss. 3 and 4) sub-s. 1 enables the Public Trustee to be appointed in all cases of appointment as the sole trustee, and sub-s. 2 enables the Public Trustee to be left in all cases of retirement as the sole trustee.

On this view of the effect of s. 5 of the Public Trustee Act, 1906, it is unnecessary for me to consider whether the terms of sub-s. 1 of that section are in themselves sufficient to override in this respect the provisions of sub-s. 5 of s. 10 of the Trustee Act, 1893. But in saying this I must not be understood as in any way dissenting from the view expressed by Eve J. that they are sufficient.

Mr. Sheldon's second objection was the more obvious one, that the provision in the will that the number of trustees is not to be reduced below three is a direction to the contrary within the meaning of sub-s. 3 of s. 5. It is, however, to be observed that the direction to the contrary which is dealt with by the sub-section is, primarily at all events, a direction entirely prohibiting the appointment of the Public Trustee and has no special reference at all to his appointment as a sole trustee. The language is very different from that of sub-s. 5 of s. 10 of the Trustee Act. Here it is admitted that, apart from the question of number, there is nothing whatever to prevent the appointment of the Public Trustee as one of the trustees of the will. And even if the provision in the will is to be deemed a direction that the Public Trustee, like any other trustee, is to be one of not less than three (which I very much doubt having regard to the entirely new constitution and position of the statutory corporation created by the Public Trustee Act), I am of opinion that this direction is overridden by the concluding words of sub-s. 1 of s. 5 of the Act, and is not a direction to the contrary within the true meaning of sub-s. 5 of the section.

Accordingly I propose to declare that, on the true construction of the will and in the events which have happened, the applicants have power to appoint the Public Trustee sole trustee of the will in their place.

[His Lordship ordered the costs of adding the Public Trustee and of the adjournment into Court, as between solicitor and client, to be paid by the Public Trustee, and the rest of the costs of the summons, as between solicitor and client, to be paid out of the trust estate.]

Solicitors: *Theodore Goddard & Co.; L. J. Fulton, Legal Adviser to the Public Trustee.*

F. E.

UNIVERSITY OF LONDON PRESS, LIMITED *v.* UNIVERSITY TUTORIAL PRESS, LIMITED.

[1916 U. 119.]

PETERSON J.
1916
July 13, 14, 18, 19, 26.

Copyright—Examination Papers—" Original literary work "—" Contract of service "—Assignment—Right to sue—" Fair dealing "—Infringement—Copyright Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1 (*i.*); *s.* 5, *sub-s.* 1 (*b*); *s.* 35, *sub-s.* 1.

Papers set by examiners are "literary work" within the meaning of the Copyright Act, 1911.

Examiners were appointed for a matriculation examination of the University of London, a condition of appointment being that any copyright in the examination papers should belong to the University. The University agreed with the plaintiff company to assign the copyright, and by deed purported to assign it, to the plaintiff company. After the examination the defendant company issued a publication containing a number of the examination papers (including three which had been set by two examiners who were co-plaintiffs), with criticisms on the papers and answers to questions. In an action for infringement of copyright:—

Held, that copyright subsisted in the examination papers as "original literary work" within the meaning of s. 1, sub-s. 1, of the Copyright Act, 1911; that the copyright vested in the examiners; that the examiners were not "in the employment" of the University "under a contract of service" within the meaning of s. 5, sub-s. 1 (*b*); that the examiners were subject to an obligation under their appointment to assign the copyright to the University or as the University might direct; that, the University having assigned

PETERSON J.

1916

University of London Press, Limited v. University Tutorial Press, Limited

its rights to the plaintiff company, the plaintiff company was equitably entitled to the copyright; that the plaintiff company, having joined two of the examiners as co-plaintiffs, could sue for infringement of copyright in the papers set by the two examiners, but must fail as to the papers set by the other examiners; and that the defendant company, having failed to bring itself within the protection of s. 2, sub-s. 1 (i.), had infringed the copyright in the papers set by the co-plaintiffs.

WITNESS ACTION.

On February 24, 1915, the Senate of the University of London passed a resolution that "it be made a condition of the appointment of every examiner that any copyright possessed by him in examination papers prepared by him for the University shall be vested in the University, provided that the foregoing shall not apply to copyright in drawings; and that it be a further condition of such appointment that the University will raise no objection to the use by any such examiner, without payment, of the material of any paper set by him for any purpose except the republication of such paper as a whole, and that the University shall, without payment, have the right of reproduction of any drawing included in such paper." Examiners were subsequently appointed for the matriculation examinations to be held in September, 1915, and January and June, 1916. Among the examiners so appointed were Professor Lodge and Mr. Jackson, who were the examiners for the purpose of setting the examination papers in mathematics. The appointment was communicated to the examiners by letter of May 19 informing them that they "were this day elected to the office of examiner in mathematics"—or as the case might be—"in this University for the matriculation examinations in September, 1915, and January and June, 1916." Enclosed was a copy of the resolution as to copyright. The duties and salaries of the examiners were fixed. The examiners were not on the staff of the University. They were employed, for the particular examinations for which they were appointed, to prepare the examination papers on the subjects in respect of which they were respectively appointed. The papers were prepared in the examiners' own time. They were free, subject to a syllabus and having regard to the knowledge required from students, to choose their own questions. They perused the answers of students and awarded marks. They were paid a lump sum as salary. They were not bound to give their services exclusively to the London University. The examiners thus appointed prepared examination papers for September, 1915, and January, 1916. On July 26, 1915, the University entered into an agreement with the University of London Press, Limited, the plaintiff company, by which it was agreed that as and when after August 31, 1915, the University should from time to time prepare and issue or cause to be prepared and issued any examination papers (other than papers not material to this report) the University agreed (subject to the provisions and conditions thereinafter contained) from time to time to assign and make over to the Press Company all such copyright and rights of publication (if any) as the University might have in such respective papers (other than those as aforesaid) for the period of six years from the date of publication thereof respectively, with a proviso for a further period in absence of notice. By an indenture of January 13, 1916, made between the University and the University of London Press, Limited, in pursuance of the agreement of July 26, 1915, and for the consideration mentioned, the University purported to assign to the Press Company all the copyright and rights of publication of the University in the papers of which particulars were contained in a schedule for the period and subject to the terms and conditions contained in the agreement. The schedule included the matriculation examination for January, 1916. The University of London Press, Limited, proceeded in January to publish the examination papers for the examination of January, 1916. In the same month the defendant company, the University Tutorial Press, Limited, issued a publication in which were included sixteen out of forty-two matriculation papers of January, 1916. The papers were not copied from the publication of the University of London Press, Limited, but were taken from copies of the examination papers supplied by students. Amongst the sixteen papers taken were three which were set by Professor Lodge and Mr. Jackson, one in arithmetic and algebra, another in geometry, and a third in more advanced mathematics. In addition to the papers so published the University Tutorial Press, Limited, published in the same book the answers to the questions in some of the papers, including the arithmetic and algebra paper and the geometry paper, but did not publish any answers to the questions in more advanced mathematics; and, further, made some criticisms on the way in which the papers had been set. On February 24, 1916, the University of London Press, Limited, commenced this action against the Tutorial Press, Limited, for infringement of copyright, and, objection being taken that the plaintiff company was not entitled to sue, Professor Lodge and Mr. Jackson were, in the course of the proceedings, joined as co-plaintiffs.

Clayton, K.C., and *MacSwinney*, for the plaintiffs. The title of the plaintiff company depends on the agreement and the assignment. The agreement alone amounts to a good equitable assignment—*Ward, Lock & Co.* v. *Long* (1)—satisfying s. 5, sub-s. 2, of the Copyright Act, 1911. The University had a good title to the copyright because the examiners were in the employment of the University under a "contract of service" and the papers were composed or compiled in the course of their employment, within s. 5, sub-s. 1 (*b*): *Byrne* v. *Statist Co.* (2) They took up their work, with notice of the condition that the copyright was to belong to the University, without dissent. In any case, Professor Lodge and Mr. Jackson are co-plaintiffs and the action can be maintained in respect of their examination papers. The examination papers are subject-matter of copyright, as "original literary work," within s. 1, sub-s. 1. "Literary work" includes "compilations": s. 35, sub-s. 1. The setting of the papers entailed the exercise of brainwork, memory, and trained judgment, and even the selection of passages from other authors' works involved careful consideration, discretion, and choice. They constituted original literary work: *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association* (3); *Walter* v. *Lane* (4); *Hollinrake* v. *Truswell.* (5)

Maugham, K.C., and *Macgillivray*, for the defendants. The plaintiff company has no copyright. To maintain the action the plaintiff company must be either the author, the owner under s. 5, sub-s. 1 (*b*), or the assignee under s. 5, sub-s. 2. The plaintiff company does not come under the first or the third description, and the authors of the papers were not under a "contract of service" within s. 5, sub-s. 1 (*b*). A person employed for a particular work

(1) [1906] 2 Ch. 550.
(2) [1914] 1 K. B. 622, 627.
(3) (1889) 40 Ch. D. 425.
(4) [1900] A. C. 539.
(5) [1894] 3 Ch. 420.

is not under a "contract of service." The principal tests of such a contract are time of employment, regularity of employment, place of work, form of remuneration (whether by time or piece work), amount of direct control, and character of work. Not one only but some or all of those factors have to be considered. There was no contract of service between these examiners and the University in this case any more than there was between the doctor and the corporation in *Evans* v. *Liverpool Corporation* (1), or between the surgeons and the hospital in *Hillyer* v. *Governors of St. Bartholomew's Hospital* (2), or between the laundry girl who gave piano lessons and the pupil in *Simmons* v. *Heath Laundry Co.* (3), or between the taxicab driver and the owners who let the cab to him in *Smith* v. *General Motor Cab Co.* (4), or between the curate and his bishop or the incumbent in *In re Employment of Church of England Curates.* (5) To constitute a contract of service there must be the relation of master and servant. There was not that relation here. The examiners held a post or office like that of a house surgeon. *Byrne* v. *Statist Co.* (6) really supports the defendants' contention, also *In re Beeton & Co.* (7) So far, therefore, as s. 5, sub-s. 1 (*b*), is concerned, the copyright, if any, remained in the examiners. There was no contract which the University could have enforced against them. The whole provision of s. 5, sub-s. 2, requiring an assignment to be in writing is designed to protect the author. The plaintiff company had no legal or equitable interest in the copyright. Whatever rights the examiner co-plaintiffs may have to maintain the action, the plaintiff company has none, and the joining of the co-plaintiffs was an illegal maintenance and an abuse of the process of the Court: *Alabaster* v. *Harness* (8); *Oram* v. *Hutt.* (9) The action should be dismissed as against the plaintiff company.

As to the two co-plaintiffs, though it is no defence that the action is illegally maintained, yet it affects the question of costs. They have suffered, and will suffer, no damage. They are entitled only to nominal damages at most, and ought to have no costs: *Dicks* v. *Brooks.* (10) The Court has absolute discretion under s. 6, sub-s. 2.

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(1) [1906] 1 K. B. 160.
(2) [1909] 2 K. B. 820.
(3) [1910] 1 K. B. 543.
(4) [1911] A. C. 188.
(5) [1912] 2 Ch. 563.
(6) [1914] 1 K. B. 622.
(7) [1913] 2 Ch. 279.
(8) [1895] 1 Q. B. 339.
(9) [1914] 1 Ch. 98.
(10) (1880) 15 Ch. D. 22, 39.

But, assuming the co-plaintiff examiners were suing on their own behalf, they have no copyright. The Act of 1911 sets a higher standard of copyright than was required by the Act of 1842. What was protected in *Davis* v. *Benjamin* (1) could not now be protected as a book. "Literary work" is much narrower than "book," the definition of which is now only retained for the purpose of delivery of copies to the British Museum: s. 15, sub-s. 7. Assuming that there may be copyright in questions requiring great invention, that does not apply to examination papers of such an elementary kind as these, giving small opportunity for originality. Only by perversion of language can the examination papers here be called literary work. Each individual question, taken alone, has not sufficient substance of literary expression to give it protection. The value is in the idea, as to which there can be no copyright: *Hollinrake* v. *Truswell* (2); *Jarrold* v. *Heywood.* (3) There can be no copyright in taking a passage, say, from Livy or Macaulay, on the ground that such a selection is original literary work. The word "original" was not in the old Copyright Act nor mentioned in *Walter* v. *Lane.* (4) Nor, taking the questions together, can the papers be called "compilations." A compilation involves quantum, and ten questions are not enough to constitute a compilation, nor two or three or even ten pieces of poetry selected from a few authors. The cases where protection has been given have been something quite different from what there is here, namely, compilations of facts or statistics for purposes of reference and of permanent value. It might as well be said the Prime Minister has copyright in his list of the Cabinet, or the captain of a cricket team in his list of names of the players.

Even assuming copyright in the papers, there has been no infringement. What the defendants have done has been "fair dealing" "for the purposes of private study" within s. 2, sub-s. 1 (i.). The defendants give not only these papers, but also a number of others, for the purpose of enabling prospective candidates to prepare for examination, and the fact that they may make a profit out of it is not relevant. A man may take part, or even the whole, of a copyright work, without being liable, if he adds to it a considerable

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(1) [1906] 2 Ch. 491.
(2) [1894] 3 Ch. 420.
(3) (1869) 18 W. R. 279.
(4) [1900] A. C. 539.

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amount of matter—Copinger's Law of Copyright, 5th ed. p. 156—as the defendants have in working out the answers and in making criticisms. So too if he uses it for an entirely different purpose: *Cary* v. *Kearsley*. (1) The test is whether there is competition with the original object: *Glyn* v. *Weston Feature Film Co.* (2) The defendants are not superseding the objects of the examiners, but rather benefiting them. They are not a rival University "cribbing" the papers for examination purposes. They are publishing for the benefit of education and without any animus furandi: *Scott* v. *Stanford* (3); *Jarrold* v. *Heywood*. (4) No damage is proved, and it is no case for an injunction.

MacSwinney in reply. At the least the papers were compilations: *Trade Auxiliary Co.* v. *Middlesborough and District Tradesmen's Protection Association* (5); *Jarrold* v. *Houlston*. (6) Cases under the Act of 1842 are authorities on the Act of 1911. There is nothing to prevent a man bargaining that a copyright shall vest in some one other than himself, in whom it would otherwise vest. An inchoate or equitable right is a sufficient title to copyright. An equitable assignment is an assignment: *Ward, Lock & Co.* v. *Long*. (7) There is no necessity for an agreement to assign to be in writing: *Leyland* v. *Stewart* (8); *Hole* v. *Bradbury*. (9) The Court has all through the Copyright Acts given effect to an inchoate or equitable title as much as to the legal title: *Sweet* v. *Shaw* (10); *Cocks* v. *Purday* (11); *Colburn* v. *Duncombe* (12); *Sweet* v. *Cater* (13); *Hodges* v. *Welsh* (14); *Bohn* v. *Bogue* (15); *Grace* v. *Newman*. (16) The only conclusion upon the facts is that the examiners were under a "contract of service." Even if infringement is innocent, an injunction may be granted, though the damages be nominal or nil: s. 8. At any rate, the two co-plaintiffs are entitled to an injunction.

Cur. adv. vult.

(1) (1803) 4 Esp. 168.
(2) [1916] 1 Ch. 261.
(3) (1867) L. R. 3 Eq. 718.
(4) 18 W. R. 279.
(5) 40 Ch. D. 425.
(6) (1857) 3 K. & J. 708.
(7) [1906] 2 Ch. 550.
(8) (1876) 4 Ch. D. 419.
(9) (1879) 12 Ch. D. 886.
(10) (1839) 8 L. J. (Ch.) 216.
(11) (1848) 5 C. B. 860.
(12) (1838) 9 Sim. 151.
(13) (1841) 11 Sim. 572.
(14) (1840) 2 Ir. Eq. Rep. 266, 287, 288.
(15) (1846) 10 Jur. 420.
(16) (1875) L. R. 19 Eq. 623.

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July 26. PETERSON J., after stating the facts. The first question that is raised is, Are these examination papers subject of copyright? Sect. 1, sub-s. 1, of the Copyright Act of 1911 provides for copyright in "every original literary dramatic musical and artistic work," subject to certain conditions which for this purpose are immaterial, and the question is, therefore, whether these examination papers are, within the meaning of this Act, original literary works. Although a literary work is not defined in the Act, s. 35 states what the phrase includes; the definition is not a completely comprehensive one, but the section is intended to show what, amongst other things, is included in the description "literary work," and the words are "'Literary work' includes maps, charts, plans, tables, and compilations." It may be difficult to define "literary work" as used in this Act, but it seems to be plain that it is not confined to "literary work" in the sense in which that phrase is applied, for instance, to Meredith's novels and the writings of Robert Louis Stevenson. In speaking of such writings as literary works, one thinks of the quality, the style, and the literary finish which they exhibit. Under the Act of 1842, which protected "books," many things which had no pretensions to literary style acquired copyright; for example, a list of registered bills of sale, a list of foxhounds and hunting days, and trade catalogues; and I see no ground for coming to the conclusion that the present Act was intended to curtail the rights of authors. In my view the words "literary work" cover work which is expressed in print or writing, irrespective of the question whether the quality or style is high. The word "literary" seems to be used in a sense somewhat similar to the use of the word "literature" in political or electioneering literature and refers to written or printed matter. Papers set by examiners are, in my opinion, "literary work" within the meaning of the present Act.

Assuming that they are "literary work," the question then is whether they are original. The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author. In the present case it was not suggested that any of the papers were copied. Professor Lodge and Mr. Jackson proved that they had thought out the questions which they set, and that they made notes or memoranda for future questions and drew on those notes for the purposes of the questions which they set. The papers which they prepared originated from themselves, and were, within the meaning of the Act, original. It was said, however, that they drew upon the stock of knowledge common to mathematicians, and that the time spent in producing the questions was small. These cannot be tests for determining whether copyright exists. If an author, for purposes of copyright, must not draw on the stock of knowledge which is common to himself and others who are students of the same branch of learning, only those historians who discovered fresh historical facts could acquire copyright for their works. If time expended is to be the test, the rapidity of an author like Lord Byron in producing a short poem might be an impediment in the way of acquiring copyright, and, the completer his mastery of his subject, the smaller would be the prospect of the author's success in maintaining his claim to copyright. Some of the questions, it was urged, are questions in book work, that is to say, questions set for the purpose of seeing whether the student has read and understood the books prescribed by the syllabus. But the questions set are not copied from the book ; they are questions prepared by the examiner for the purpose of testing the student's acquaintance with the book, and in any case it was admitted that the papers involved selection, judgment, and experience. This objection has not, in my opinion, any substance ; if it had, it would only apply to some of the questions in the elementary papers, and would have little, if any, bearing on the paper on advanced mathematics. Then it was said that the questions in the elementary papers were of common type ; but this only means that somewhat similar questions have been asked by other examiners. I suppose that most elementary books on mathematics may be said to be of a common type, but that fact would not give impunity to a predatory infringer. The book and the papers alike originate from the author and are not copied by him from another book or other papers. The objections with which I

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have dealt do not appear to me to have any substance, and, after all, there remains the rough practical test that what is worth copying is prima facie worth protecting. In my judgment, then, the papers set by Professor Lodge and Mr. Jackson are " original literary work " and proper subject for copyright under the Act of 1911.

The next question is, In whom did the copyright in the examination papers vest when they had been prepared ? This problem must be solved by the determination of the effect of s. 5 of the Act of 1911. The author, by that section, is the first owner of the copyright, subject only to the exceptions contained in the Act. The only relevant exception is to be found in s. 5, sub-s. 1 (*b*). [His Lordship read the section so far as relevant (1), and continued :] The examiners were no doubt employed by the University of London, and the papers were prepared by them in the course of their employment. But, in order that s. 5, sub-s. 1 (*b*), should be applicable, the examiners must have been " under a contract of service or apprenticeship " ; and accordingly the plaintiffs contend that the papers were prepared by the examiners in the course of their employment under a contract of service, and that, therefore, the copyright in the papers belonged to the University of London. The meaning of the words " contract of service " has been considered on several occasions, and it has been found difficult, if not impossible, to frame a satisfactory definition for them. In *Simmons* v. *Heath Laundry Co.* (2), in which the meaning of these words in the Workmen's Compensation Act, 1906, was discussed, Fletcher Moulton L.J. pointed out that a contract of service was not the same thing as a contract for service, and that the existence of direct control by the

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(1) Copyright Act, 1911, s. 5: " (1.) Subject to the provisions of this Act, the author of a work shall be the first owner of the copyright therein : Provided that . . . . (*b*) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical."

(2) [1910] 1 K. B. 543.

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employer, the degree of independence on the part of the person who renders services, the place where the service is rendered, are all matters to be considered in determining whether there is a contract of service. As Buckley L.J. indicated in the same case, a contract of service involves the existence of a servant, and imports that there exists in the person serving an obligation to obey the orders of the person served. A servant is a person who is subject to the commands of his master as to the manner in which he shall do his work. A person who is employed by a company at a fixed annual salary to supply weekly articles for a periodical is not a servant within s. 209 of the Companies Consolidation Act, 1908: *In re Beeton & Co.* (1); nor can a visiting physician of a hospital who, for an annual salary, undertakes to exercise his judgment, skill, and knowledge in determining whether a patient can safely be discharged be properly described as a servant: *Evans* v. *Liverpool Corporation.* (2) In *Byrne* v. *Statist Co.* (3) the meaning of the words in s. 5 of the Copyright Act, 1911, was considered in the case of a person, permanently employed on the editorial staff of a newspaper, who was specially employed by the proprietors to translate and summarize a speech. He did the work in his own time and independently of his ordinary duties, and it was held that in doing so he did not act under a contract of service. In the present case the examiner was employed to prepare the papers on the subject in respect of which he was elected or appointed examiner. He had to set papers for September, 1915, and January and June, 1916, and his duty also comprised the perusal of the students' answers, and the consideration of the marks to be awarded to the answers. For this he was to be paid a lump sum. He was free to prepare his questions at his convenience so long as they were ready by the time appointed for the examination, and it was left to his skill and judgment to decide what questions should be asked, having regard to the syllabus, the book work, and the standard of knowledge to be expected at the matriculation examination. It is true that the University issued instructions to examiners for the conduct of the examination, but these instructions are only regulations framed with a view to securing accuracy in the system of marking. Professor Lodge and Mr. Jackson were

(1) [1913] 2 Ch. 279. (2) [1906] 1 K. B. 160.
(3) [1914] 1 K. B. 622.

regularly employed in other educational establishments and were not part of the staff of the London University, and it was not suggested that the other examiners were on the staff of the University. In my judgment it is impossible to say that the examiner in such circumstances can be appropriately described as the servant of the University, or that he prepared these papers under a contract of service.

The plaintiffs' next contention was that the copyright in the papers vested at once in the University by virtue of the fact that the examiners were employed on the terms that the copyright should belong to the University, who thereby became equitable assignees of the copyright; and *Grace* v. *Newman* (1) was cited in support of this argument. *Grace* v. *Newman* (1) seems to be one of those cases which under the present Act would come within s. 5, sub-s. 1 (*b*), but, however that may be, the present question must be determined by the provisions of the Act of 1911. Sect. 5 declares that, subject to the provisions of the Act, the author shall be the first owner of the copyright, and that every assignment of a copyright must be in writing, signed by the owner or his agent. The only exceptions from the rule that the author is the first owner are the cases mentioned in s. 5, sub-s. 1 (*a*) and (*b*), which do not cover the present case. The examiner was the first owner, and he has not assigned the copyright in writing signed by him or his agent. The copyright therefore remains in the examiners, subject to the obligation under the contract of employment to assign it to the University or as it may direct. The copyright was vested in the examiners, but the University was equitably entitled to it subject to the restrictions contained in the proviso to s. 5, sub-s. 2. The University assigned its rights to the plaintiff company, which is now equitably entitled to the copyright. In order to sue for infringement of the copyright, the plaintiff company must either obtain a proper assignment of the copyright or join the examiners, who are the legal owners of the copyright, as parties. It has not obtained an assignment, but it has in the course of the action joined Professor Lodge and Mr. Jackson as co-plaintiffs. The plaintiffs can therefore sue for infringement of the copyright in the papers prepared by Professor Lodge and Mr. Jackson, but, in the absence of the other examiners, the action fails

(1) L. R. 19 Eq. 623.

in respect of the copyright in the papers which were composed by them.

The last question is whether the defendants have infringed the copyright in the papers prepared by Professor Lodge and Mr. Jackson. Examination papers are useful for educational purposes, and, as Professor Lodge said, teachers are "very glad to get copies of old questions for use in tuition," and it is important that students should get the questions for purposes of "instruction." This view was common to the witnesses on both sides. Recognizing this demand, the plaintiff company published the matriculation papers. With the same object in view, the defendants published the "London Matriculation Directory," which contains sixteen of the matriculation papers for January, 1916, including the papers on arithmetic and algebra, geometry, and more advanced mathematics, set by Professor Lodge and Mr. Jackson. The defendants' publication also includes, amongst others, answers to the questions in the papers on arithmetic and algebra and geometry, but does not provide solutions for the problems in the paper on more advanced mathematics; and it also comprises a short criticism of the construction of the various papers, which appears to be intended for the guidance of future examiners rather than for the edification of possible students. These criticisms, however, appear to me to be of very little moment. The defendants on these facts contend that their publication of the three papers set by Professor Lodge and Mr. Jackson is a fair dealing with them for the purposes of private study within s. 2, sub-s. 1, of the Act of 1911, and is therefore not an infringement of copyright. It could not be contended that the mere republication of a copyright work was a "fair dealing" because it was intended for purposes of private study; nor, if an author produced a book of questions for the use of students, could another person with impunity republish the book with the answers to the questions. Neither case would, in my judgment, come within the description of "fair dealing." In the present case the paper on more advanced mathematics has been taken without any attempt at providing solutions for the questions, and the only way in which the defendants have dealt with this paper is by appropriating it, except that there are eleven lines of criticism of it, dividing the questions into easy, troublesome, and difficult questions.

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To the questions in the other two papers answers are provided. Both publications are intended for educational purposes and for the use of students, and in my judgment the defendants have failed to bring themselves within the protection of s. 2, sub-s. 1 (i.), of the Act.

I am therefore of opinion that the plaintiffs ought to succeed so far as the questions prepared by Professor Lodge and Mr. Jackson for the examination in January, 1916, are concerned, and that the present action, so far as it relates to the papers set by the other examiners, fails.

Solicitors: *Dennes, Lamb & Pearce Gould; Field, Roscoe & Co.*

A. L.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1916, will be as follows :—

In the First Series,
[1916] 1 Ch. [1916] 2 Ch.

In the Second Series,
[1916] 1 K. B. [1916] 2 K. B. [1916] P.

In the Third Series,
[1916] 1 A. C. [1916] 2 A. C.

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Testator bequeathed to trustees a sum of 10,000*l.* upon trust to provide out of the income thereof and of any accumulations thereof a sum sufficient for the maintenance of his daughter A. during her life, and to accumulate the surplus income for any period not exceeding the term of twenty-one years from his death, and to hold the accumulations on the like trusts as the original sum of 10,000*l.*, but with liberty to apply any such accumulations as if they were income arising in the then current year; and directed that all surplus income arising after the expiration of the said term and not so applied should fall into and form part of his residuary estate, and subject to the trusts aforesaid directed that the said sum of 10,000*l.* and the income thereof and the accumulations of income or so much thereof as should not have been so applied should be held on trusts in favour of the children of A., and in default of children should fall into and form part of his residuary estate. The testator bequeathed a second sum of 10,000*l.* on similar trusts in favour of his daughter B. and her children, with similar trusts in default of children; and gave his residuary estate upon trusts under which each of his daughters C. and D. took a life interest with a general testamentary power of appointment, with a trust in default of appointment for her statutory next of kin.

At the expiration of the period of twenty-one years the trustees had made certain accumulations of the unapplied income of each legacy of 10,000*l.*, and since that date the surplus income of the two legacies and of the past accumulations had also been accumulated by the trustees. All four daughters were still living. On a summons taken out for the purpose of ascertaining how such surpluses ought to be dealt with :—

Held, that, according to the true construction of the will, the surplus income of the legacies, after the expiration of the term of twenty-one years, was not given to the tenants for life of the residuary estate as income, but was to be added to the capital of the residuary estate and dealt with accordingly.

Held, also, that on this construction of the will the addition of the surplus income to the capital was in effect an accumulation within the provisions of the Thellusson Act, and that the will must be read as if this direction were eliminated.

In re Phillips (1880) 49 L. J. (Ch.) 198 and *In re Cababé* (1914) 59 Sol. J. 129 followed in preference to *Crawley* v. *Crawley* (1835) 7 Sim. 427, *O'Neill* v. *Lucas* (1838) 2 Keen, 313, and *In re Pope* [1901] 1 Ch. 64.

Held, also, that on this footing the surplus income of the original legacies after the expiration of the term of twenty-one years, and also the income of the accumulations made during the term of twenty-one years, were not undisposed of, but were properly payable to the tenants for life of the residuary estate.

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ANNUITY—*Will—Administration—Payable out of Income of Settled Share—Right of Trustees to retain Surplus Income to meet Possible Deficiency in a Future Year.*

Testator bequeathed one sixth share of his residuary estate to trustees upon trust out of the income thereof to pay to his widow during her life an annuity of 1000*l.* a year, and "subject thereto to permit the same share and the income thereof" to devolve under trusts therein declared or referred to in favour of the testator's son and daughter and their issue respectively:—

Held, that, according to the true construction of the will, so long as the annuity was being paid in full the trustees had no power to retain surplus income of a past year for the purpose of making good a possible deficiency in a future year. *In re* PLATT. SYKES *v.* DAWSON - **Sargant J. 563**

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A testator who died in December, 1913, bequeathed his residuary estate to trustees upon trust to pay the dividends and income thereof to his wife for life, and after her death to stand possessed of the residuary estate in trust for his nephews and nieces. The widow died on July 24, 1915. Part of the residuary estate consisted of stocks in three railway companies. In September, 1915, each of these railway companies declared a dividend, payable about a month afterwards, for the half-years ending on the preceding June 30, 1915:—

Held, that the Apportionment Act, 1870, applied, and the estate of the tenant for life was entitled to the whole of these dividends.

In re Oppenheimer [1907] 1 Ch. 399 followed.

Whenever there are periodical payments accruing when the event calling for apportionment occurs, the Act is at once brought into operation and must be applied, and when, subsequently, the accruing payments become due and payable they must be distributed in accordance with the Act as applied on the occurrence of the event which brought it into operation. *In re* MUIRHEAD. MUIRHEAD *v.* HILL - **181**

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S., C. & B. had made contracts to purchase beet sugar to be delivered f.o.b. at Hamburg in August, 1914. On July 31, 1914, the German Government placed an embargo on the export of beet sugar. S., C. & B. contracted with B., G. & Co., neither party knowing of the embargo, to sell to them sugar to be delivered at Hamburg. This contract incorporated the rules of the Sugar Association of London, including a war clause whereby in the event of a German war contracts were to be deemed to be closed and were to be referred to the Sugar Association Council, and provisions for arbitration:—

Held, affirming the decision of Warrington J., that although the contract, owing to the war and the declarations against trading with the enemy, could no longer be carried out, it was not invalid when it was made, and that it might have been carried out by delivering the sugar to a warehouse at Hamburg; that the parties were bound by the arbitration clause; and that B., G. & Co.'s proceedings under that clause ought not to be restrained. SMITH, CONEY & BARRETT *v.* BECKER, GRAY & Co. - - - **C. A. 88**

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By an antenuptial settlement property of the husband was settled upon trust to pay the income thereof to him during his life, or until he should be outlawed or be declared bankrupt, or become an insolvent debtor, or should do or suffer something whereby the income or some part thereof might if absolutely belonging to him become vested in or payable to some other person or persons, and from and after the death of the husband or other the determination of

BANKRUPTCY—*continued.*
the trust for his benefit in his lifetime to pay the income unto the wife for life. The husband was adjudicated bankrupt in his wife's lifetime:—

Held, that upon the bankruptcy the husband's life interest vested indefeasibly in his trustee in bankruptcy and was no longer capable of being affected by any subsequent act of forfeiture by the husband, and that the trustee in bankruptcy could make a good title to the income of the settled property during the remainder of the husband's life. *In re* Burroughs-Fowler. The Trustee of the Property of W. J. Burroughs-Fowler (a Bankrupt) *v.* Burroughs-Fowler.
Peterson J. 251

—— Partnership - - - - - - **544**
See Mortgage. 2.

BEQUEST.
See Will.

BILL OF SALE—*Consideration, Statement of—Money "now paid"—Retention by Lender to meet Debt—Debt not yet due—Bills of Sale Act* (1878) *Amendment Act*, 1882 (45 & 46 *Vict.* c. 43), *ss.* 7, 8.

The plaintiff in 1914 borrowed on a bill of sale from the defendants 400*l.*, repayable by instalments of which 325*l.* was still unpaid. In 1915 she borrowed on a fresh bill of sale from the defendants 450*l.*, of which by agreement 100*l.* was paid to one of her creditors, 25*l.* to herself, and the remainder was retained to meet the 325*l.* This agreement was carried out in such a way that a question arose whether in fact the 450*l.* was at any time at her disposal. The consideration was stated in the second bill of sale to be "450*l.* by the company now paid." The plaintiff also signed a receipt as follows: "I acknowledge to have received from you this day the sum of 450*l.* free from all deductions on a bill of sale and that I have been to the bank and cashed the cheque myself":—

Held, on the facts, affirming the decision of Neville J., that as the 350*l.* was not actually due, it could not be treated as paid, that the consideration for the bill of sale was therefore not truly set forth therein, and that the bill was therefore void.

Where part of the money lent is retained by the lender it will not be treated as paid to the borrower unless it is retained to pay a debt which is actually due.

In re Haynes (1880) 15 Ch. D. 42 and *In re Davies* (1897) 4 Mans. 358 doubted. Parsons *v.* Equitable Investment Co. - - **C. A. 527**

CAPITAL—Increase - - - - - **57**
See Company. 1.

—— Reduction of - - - - - - **450**
See Company. 2.

CASES :—

—— *Ainsworth, In re* - - [1915] 2 Ch. 96
Followed. *In re* Musgrave. Machell *v.* Parry - - - - - - **417**

CASES—*continued.*

—— *Arkwright* v. *Gell* (1839) 5 M. & W. 203, 233
Dictum of Lord Abinger C.B. in, approved. Schwann *v.* Cotton
C. A. 459

—— *Bake* v. *French* - [1907] 1 Ch. 428
Not followed. Puddephatt *v.* Leith (No. 2) - - - - - - **168**

—— *Bank of England* v. *Vagliano Brothers* [1891] A. C. 107, 144, 145.
Principles laid down by Lord Herschell in, applied. MacConnell *v.* E. Prill & Co. - - - - - **57**

—— *Bellamy* v. *Davey* - [1891] 3 Ch. 540
Doubted and distinguished. Pritchett & Gold and Electrical Power Storage Co. *v.* Currie - **C. A. 515**

—— *Bellamy* v. *Debenham* (1890) 45 Ch. D. 481
Statement of the law by North J. in, approved. Perry *v.* Suffields, Ld.
C. A. 187

—— *Biggerstaff* v. *Rowatt's Wharf, Ld.* [1896] 2 Ch. 93.
Applied. *In re* Fireproof Doors, Ld.
142

—— *Blakey* v. *Latham* - (1889) 41 Ch. D. 518
Not followed. Puddephatt *v.* Leith (No. 2) - - - - - - **168**

—— *Board of Education* v. *Rice* [1911] A. C. 179
Distinguished. Cassel *v.* Inglis **211**

—— *Booth* v. *Dean* - (1833) 1 My. & K. 560
Followed. *In re* Forrest - - **386**

—— *Bradford Corporation* v. *Ferrand* [1902] 2 Ch. 655.
Distinguished. Schwann *v.* Cotton
120

—— *British Dominions General Insurance Co.* v. *Duder* [1915] 2 K. B. 304.
Distinguished. British Union and National Insurance Co. *v.* Rawson
C. A. 476

—— *British India Steam Navigation Co.* v. *Inland Revenue Commrs.* (1881) 7 Q. B. D. 165.
Applied. *In re* Fireproof Doors, Ld. - - - - - - - **142**

—— *British South Africa Co.* v. *De Beers Consolidated Mines* [1910] 2 Ch. 502.
Followed. *In re* Smith. Lawrence *v.* Kitson - - - - - - **206**

—— *British Union and National Insurance Co.* v. *Rawson* [1916] 2 Ch. 152.
Affirmed - - - - - **C. A. 476**

—— *Bullock's Will Trusts, In re* [1915] 1 Ch. 493
Followed. In re Garnham. Taylor *v.* Baker - - - - - **413**

—— *Burrows* v. *Lang* - [1901] 2 Ch. 502
Distinguished. Schwann *v.* Cotton
120

—— *Cababé, In re* - (1914) 59 Sol. J. 129
Followed on one point, explained and distinguished on another point. *In re* Hawkins - - - - **570**

CASES—*continued.*

—— *Cayley, In re* - - [1904] 2 Ch. 781
Distinguished. *In re* KENNEDY. CORBOULD *v.* KENNEDY - - 379

—— *Coalport China Co., In re* [1895] 2 Ch. 404
Applied. CASSEL *v.* INGLIS - 211

—— *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (1876) L. R. 3 Ind. Ap. 200
Applied. *In re* R. S. NEWMAN, LD. 309

—— *Crawley* v. *Crawley* - (1835) 7 Sim. 427
Not followed. *In re* HAWKINS - 570

—— *Dalton* v. *Angus* (1881) 6 App. Cas. 740, 767, 789.
Referred to. SCHWANN *v.* COTTON 120

—— *Davies, In re* - - (1897) 4 Mans. 358
Doubted. PARSONS *v.* EQUITABLE INVESTMENT CO.- - - **C. A.** 527

—— *De Sommery, In re* - [1912] 2 Ch. 622, 628
Applied. *In re* GROSVENOR - 375

—— *Embury, In re* - - (1913) 109 L. T. 511
Distinguished. *In re* TIMSON **C. A.** 362

—— *Filby* v. *Hounsell* - [1896] 2 Ch. 737
Discussed. LOVESY *v.* PALMER - 233

—— *Fisher* v. *Keane* - (1878) 11 Ch. D. 353
Distinguished. CASSEL *v.* INGLIS 211

—— *Frost, In re* - - (1889) 43 Ch. D. 246
Not followed. *In re* GARNHAM - 413

—— *Gee* v. *Manchester Corporation* (1852) 17 Q. B. 737.
Followed. *In re* BRAILSFORD. HOLMES *v.* CROMPTON & EVANS' UNION BANK 536

—— *Hadley, In re* - - - [1909] 1 Ch. 20
Principle of, applied. *In re* SCOTT **C. A.** 268

—— *Hall (W. J.) & Co., In re* [1909] 1 Ch. 521
Discussed and not followed. *In re* NEW CHINESE ANTIMONY CO. - 115

—— *Hamlyn* v. *Wood* - - [1891] 2 Q. B. 488
Applied. *In re* R. S. NEWMAN, LD. 309

—— *Harrison* v. *Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409.
Applied. PHELPS *v.* LONDON (CITY) CORPORATION - - - - 255

—— *Hatch, In re* - - [1916] W. N. 240
Distinguished. *In re* KENNEDY. CORBOULD *v.* KENNEDY - - - 379

—— *Hayman* v. *Governors of Rugby School* (1874) L. R. 18 Eq. 28.
Applied. CASSEL *v.* INGLIS - 211

—— *Haynes, In re* - - (1880) 15 Ch. D. 42
Doubted. PARSONS *v.* EQUITABLE INVESTMENT CO. - - - **C. A.** 527

—— *Holder* v. *Preston* - (1769) 2 Wils. 400
Followed. SISSONS *v.* CHICHESTER-CONSTABLE - - - - 75

—— *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.
Distinguished. PERRY *v.* SUFFIELDS, LD. - - - - - **C. A.** 187

CASES—*continued.*

—— *Jarrett* v. *Hunter* - (1886) 34 Ch. D. 182
Followed. LOVESY *v.* PALMER - 233

—— *Jenkins* v. *Jackson* - (1888) 40 Ch. D. 71
Applied. PHELPS *v.* LONDON (CITY) CORPORATION - - - - 255

—— *Knight's Case* - (1867) L. R. 2 Ch. 321
Applied. *In re* FIREPROOF DOORS, LD. 142

—— *Labouchere* v. *Earl of Wharncliffe* (1879) 13 Ch. D. 346.
Distinguished. CASSEL *v.* INGLIS 211

—— *Leconfield, In re* - - (1904) 90 L. T. 399
Distinguished. *In re* SCOTT **C. A.** 268

—— *Leeming* v. *Sherratt* - (1842) 2 Hare, 14
Considered and explained. *In re* LODWIG - - - - - **C. A.** 26

—— *Leeming* v. *Sherratt* - (1842) 2 Hare, 23
Dictum of Wigram V.-C. in, disapproved. *In re* LODWIG - **C. A.** 26

—— *Lloyd* v. *Lloyd* - - (1856) 3 K. & J. 20
Considered and explained. *In re* LODWIG - - - - - **C. A.** 26

—— *Local Government Board* v. *Arlidge* [1915] A. C. 120.
Distinguished. CASSEL *v.* INGLIS 211

—— *Lyttelton Times Co.* v. *Warners* [1907] A. C. 476.
Explained. PHELPS *v.* LONDON (CITY) CORPORATION - - - - 255

—— *Maclure, Ex parte* - (1870) L. R. 5 Ch. 737
Applied. *In re* R. S. NEWMAN, LD. 309

—— *Malpas* v. *Ackland* - (1827) 3 Russ. 273
Explained and distinguished. *In re* CHAFER AND RANDALL'S CONTRACT **C. A.** 8

—— *Manchester, Sheffield, and Lincolnshire Ry. Co.* v. *Anderson* [1898] 2 Ch. 394, 401.
Applied. PHELPS *v.* LONDON (CITY) CORPORATION - - - - 211

—— *Mayou, Ex parte* - (1865) 4 D. J. & S. 664
Distinguished. PEARCE *v.* BULTEEL 544

—— *Nicholas* v. *Chamberlain* (1606) Cro. Jac. 121.
Applied. SCHWANN *v.* COTTON - 120

—— *O'Mahoney* v. *Burdett* (1874) L. R. 7 H. L. 388.
Distinguished. *In re* BRAILSFORD 536
In re ROBERTS - - - - 42

—— *O'Neill* v. *Lucas* - (1838) 2 Keen, 313
Not followed. *In re* HAWKINS - 570

—— *Oppenheimer, In re* - [1907] 1 Ch. 399
Followed. *In re* MUIRHEAD - 181

—— *Palmer, In re* - - [1916] 2 Ch. 391
Followed. *In re* STODDART. BIRD *v.* GRAINGER - - - - - - 444

—— *Park's Settlement, In re* - [1914] 1 Ch. 595
Not followed. *In re* GARNHAM - 413

—— *Parker* v. *Sowerby* - (1853) 1 Drew. 488
Considered and explained. *In re* LODWIG - - - - - **C. A.** 26

CASES—*continued.*

—— *Parker-Jervis, In re* - [1898] 2 Ch. 643
Applied. *In re* Palmer. Palmer *v.* Palmer - - - - - C. A. 391

—— *Patton* v. *Randall* - (1820) 1 Jac. & W. 189
Discussed and distinguished. Sissons *v.* Chichester-Constable - - 75

—— *Penarth Pontoon Slipway and Ship-Repairing Co., In re* [1911] W. N. 240.
Referred to. MacConnell *v.* E. Prill & Co. - - - - - - 57

—— *Penney, Ex parte* - (1872) L. R. 8 Ch. 446
Applied. Cassel *v.* Inglis - 211

—— *Perham* v. *Kempster* - [1907] 1 Ch. 373
Distinguished. Pearce *v.* Bulteel 544

—— *Perkins, In re* - - [1898] 2 Ch. 182
Applied. British Union and National Insurance Co. *v.* Rawson C. A. 476

—— *Phillips, In re* (1880) 49 L. J. (Ch.) 198
Followed. *In re* Hawkins - 570

—— *Phillips* v. *Low* - - [1892] 1 Ch. 47
Followed. Schwann *v.* Cotton C. A. 459

—— *Pimm, In re* - - [1904] 2 Ch. 345
Distinguished. *In re* Kennedy. Corbould *v.* Kennedy - - - 379

—— *Pope, In re* - - - [1901] 1 Ch. 64
Not followed. *In re* Hawkins - 570

—— *Popular Life Assurance Co., In re* [1909] 1 Ch. 80.
Distinguished and explained. *In re* City of Glasgow Life Assurance Co. - - - - - - - 557

—— *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634; 646, 647.
Observations of Lord Parker in, explained. Phelps *v.* London (City) Corporation - - - - 255

—— *Race* v. *Ward* - (1855) 4 E. & B. 702
Applied. Schwann *v.* Cotton - 120

—— *Ralph* v. *Carrick* (1879) 11 Ch. D. 873, 884
Distinguished. *In re* Timson C. A. 362

—— *Rearden* v. *Provincial Bank of Ireland* [1896] 1 I. R. 532.
Approved and followed. Mackereth *v.* Wigan Coal and Iron Co. - 293

—— *Reg.* v. *Ipswich Corporation* (1705) 2 Ld. Raym. 1232.
Applied. Cassel *v.* Inglis - 211

—— *Reg.* v. *Wilson* - (1862) 3 B. & S. 201
Followed. Sissons *v.* Chichester-Constable - - - - 76

—— *Reid* v. *Cupper* - [1915] 2 K. B. 147
Followed. Puddephatt *v.* Leith (No. 2) - - - - - - 168

—— *Reilly* v. *Booth* - (1890) 44 Ch. D. 12
Applied. Phelps *v.* London (City) Corporation - - - - 255

CASES—*continued.*

—— *Rendall* v. *Morphew* [1914] W. N. 422; 84 L. J. (Ch.) 517.
Distinguished. British Union and National Insurance Co. *v.* Rawson C. A. 476

—— *Rigby* v. *Connol* - (1880) 14 Ch. D. 482
Distinguished. Cassel *v.* Inglis- 211

—— *Ross* v. *Ross* - - (1855) 20 Beav. 645
Distinguished. *In re* Timson C. A. 362

—— *Rossiter* v. *Miller* (1878) 3 App. Cas. 1124
Followed. Lovesy *v.* Palmer - 233

—— *Russell* v. *Russell* - (1880) 14 Ch. D. 471
Distinguished. Cassel *v.* Inglis 211

—— *Schwann* v. *Cotton* - [1916] 2 Ch. 120
Affirmed - - - - C. A. 459

—— *Scott, In re* - - [1915] 1 Ch. 592, 606
Applied. *In re* Grosvenor - 375

—— *Shelley's Case* - - (1581) 1 Rep. 93b
Rule in, applied. Silcocks *v.* Silcocks - - - - - 161

—— *Sibley* v. *Perry* - - (1802) 7 Ves. 522
Applied. *In re* Timson - C. A. 362

—— *Snape, in re* - - [1915] 2 Ch. 179
Observations on. *In re* Stoddart 444

Referred to. *In re* Palmer C. A. 391

—— *Swaythling (Lord), In re* (1912) 29 Times L. R. 88.
Disapproved. *In re* Scott- C. A. 268

—— *Taylor* v. *Caldwell* (1863) 3 B. & S. 826
Applied. *In re* R. S. Newman, Ld. 309

—— *Tharp* v. *Tharp* [1916] 1 Ch. 142
Settled on appeal - - C. A. 205

—— *Thomas, In re; Andrew* v. *Thomas* [1916] 1 Ch. 383.
Affirmed - - - - C. A. 331

—— *Thrupp* v. *Collett* (No. 2) (1858) 26 Beav. 147.
Followed. *In re* Forrest. Bubb *v.* Newcomb - - - - - 386

—— *Timson, In re; Smiles* v. *Timson* [1916] 1 Ch. 293.
Affirmed - - - - C. A. 362

—— *Todd* v. *North Eastern Ry. Co.* (1903) 87 L. T. 710; 88 L. T. 112.
Distinguished. Holloway (George) & Webb, Ld. *v.* Crompton - - 436

—— *Turner* v. *Goldsmith* - [1891] 1 Q. B. 544
Distinguished. *In re* R. S. Newman, Ld. - - - - - - 309

—— *Watts* v. *Kelson* - (1871) L. R. 6 Ch. 166
Applied. Schwann *v.* Cotton - 120

—— *Welsbach Incandescent Gas Light Co., In re* [1904] 1 Ch. 87.
Distinguished. *In re* Mackenzie & Co. - - - - - - 444

—— *Wheeldon* v. *Burrows* - (1879) 12 Ch. D. 31
Followed. Schwann *v.* Cotton C. A. 459

—— *Whitting* v. *Whitting* (1908) 53 Sol. J. 100
Not followed. *In re* Garnham - 413

CASES—*continued.*

—— *Wilkes's Charity, In re* (1851) 3 Mac. & G. 440.
Applied. CASSEL *v.* INGLIS - 211

—— *Wood* v. *Waud* - (1849) 3 Ex. 748, 779
Dictum of Pollock C.B. in, explained. SCHWANN *v.* COTTON - - **C. A. 459**

CERTIFICATE OF EXEMPTION—of works of art from duties until sale—Sale of chattels—Incidence of duties - **268**
See WILL. 8.

CHANCERY DIVISION—Costs.
See COSTS.

CHILDREN OF NEPHEWS AND NIECES—Gift to.
See WILL.

CLAM.
See EASEMENT.

CLASS.
See WILL.

COMMISSION.
See COMPANY.

COMMITTEE—Stock Exchange—Discretion—Member—Application for re-election—Application refused—No duty to give reasons for refusal - - - **211**
See STOCK EXCHANGE.

COMPANY — *Capital* — *Increase* — *Meeting* — *Notice* — *Extraordinary Resolution* — *Specifying Amount of proposed Increase* — *Companies* (*Consolidation*) *Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 69, *Sched. I.*, *Table A*, *clauses* 41, 49, 50.

Although, as decided in *In re Penarth Pontoon Slipway and Ship-Repairing Co.* [1911] W. N. 240, the notice of the first meeting to pass a special resolution need not state that the resolution proposed to be passed at that meeting is to be an extraordinary resolution, where an extraordinary resolution is proposed to be passed the notice of the general meeting must comply with s. 69 of the Companies (Consolidation) Act, 1908, by "specifying the intention to propose the resolution as an extraordinary resolution."

As regards the whole subject of an "extraordinary resolution," the Act of 1908 differs materially from the Companies Act, 1862, and its definition of that term is general; and, having regard to the plain words of its enactments in this respect, those enactments must, according to the principles laid down by Lord Herschell in *Bank of England* v. *Vagliano Brothers* [1891] A. C. 107, 144, 145, although forming part of a consolidation statute, be construed apart from the provisions of the Act of 1862 for which they are substituted and the decisions thereon.

Notice of a meeting of a company to increase or sanction the increase of the share capital of a company is not sufficient if it merely refers generally to a proposed resolution to increase the share capital; it must show an intention to make the specific increase embodied in the resolution that is actually passed. Observations on clauses 41 and 49 of the Table A scheduled to the Act of 1908. MACCONNELL *v.* E. PRILL & Co. - - - - - **Sargant J. 57**

COMPANY—*continued.*

2. —— *Capital* — *Reduction* — *Preference Shares* — *Holders' Rights fixed by Memorandum and Articles—No Priority as to Capital—No Voting Power—Fixed Preferential Dividend on Amount paid up—Modification of Rights Clause—Rights unalterable without requisite Consent—Rateable Reduction—Consent unnecessary—Right to be summoned to Meetings.*

Where there is more than one class of shares in a company a petition for reduction of capital ought to state whether or not there is any priority as to capital.

Where under the memorandum and articles preference shareholders have no priority as to capital and no voting power but are merely entitled to a fixed cumulative preferential dividend on the nominal amount of the capital from time to time paid up on their shares, and the company has power to reduce capital, a rateable reduction on all the shares, preference and ordinary, though diminishing the actual preferential dividend, is not an alteration of the rights of the preference shareholders so as to require their sanction under an ordinary modification of rights clause.

In re Welsbach Incandescent Gas Light Co. [1904] 1 Ch. 87 distinguished.

Semble. Apart from some special provision in the articles preference shareholders with no right of voting are not entitled to be summoned to general meetings. *In re* MACKENZIE & Co.
Astbury J. 450

—— Debentures.
See MORTGAGE.

3. —— *Directors—Election of—"Day of Election"—Adjourned Meeting—Notice—Articles of Association—Injunction.*

One of the articles of association of a limited company provided that a member should not be qualified to be elected a director unless written notice of the intention in that behalf were given to the company not less than fourteen clear days before the "day of election" of directors. The ordinary general meeting of the company was held on March 10, 1916, at which meeting, according to the articles, the two defendant directors retired by rotation. The report of the directors was not adopted; there was no election of directors, but a committee of shareholders was appointed to investigate the affairs of the company and report to a general meeting, and the meeting stood adjourned to receive this report. On February 21, 1916, written notice was given to the company by a shareholder stating that at the adjourned meeting he proposed to move the election of four named persons as directors. The adjourned meeting was held on March 10, 1916, to consider the committee's report and to transact the unfinished business. The chairman ruled the notice of February 21, 1916, to be out of order, and after declaring the election of auditors said there was no further business and

COMPANY—*continued.*

left the chair. Subsequently the shareholders appointed a chairman and elected the four new directors. On motion by the shareholders for an interlocutory injunction to restrain the two former directors from acting :—

Held, that the day of election of directors within the meaning of the article was the date of the adjourned meeting on March 10, 1916; that the notice of February 21, 1916, was in compliance with that article; and that the first two persons elected as directors in lieu of the two who retired were duly elected. The injunction asked for must be granted. CATESBY *v.* BURNETT - - - - - - **Eve J. 325**

4. —— *Directors — Minutes — Resolution omitted — Parol Evidence — Admissibility — Quorum of One—Committee of One—Series of Mortgage Debentures—Registration of Series—Sealing—Irregularity—Debentures valid as Agreements—Sufficiency of Registration as Series—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 93, *sub-ss.* 2, 3.

The minutes of a meeting are not exclusive evidence of what takes place there. An unrecorded resolution may be proved aliunde.

Knight's Case (1867) L. R. 2 Ch. 321 applied.

Where a company is regulated by Table A (revised 1906) or New Table A a board of directors may appoint a quorum of one under art. 88 or delegate their powers to a committee of one under art. 91.

In the absence of special provision in the articles a mortgage debenture does not require a seal.

British India Steam Navigation Co. v. *Inland Revenue Commissioners* (1881) 7 Q. B. D. 165 and *Biggerstaff* v. *Rowatt's Wharf, Ltd.* [1896] 2 Ch. 93 applied.

The registration of a series of debentures under s. 93, sub-s. 3, of the Companies (Consolidation) Act, 1908, protects not only debentures of that series properly issued, but also documents purporting to be debentures of that series which owing to some technical defect can only be upheld as agreements for those debentures, and it is not necessary to register those agreements separately under sub-s. 2. *In re* FIREPROOF DOORS, LD. UMNEY *v.* THE CO. **Astbury J. 142**

—— Germany—Incorporated in—Branch business in England - - - - **503**
See TRADING WITH THE ENEMY.

—— Insurance (Life)—Deposit—Amalgamation —Dissolution of vendor company—Carrying over deposit - - **557**
See INSURANCE (LIFE).

5. —— *Shares—Partly-paid—Executors and Trustees—Indebtedness of Holder—Recognition of Trust—Lien—Articles of Association--Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 27.

Articles of association of the defendant company provided: " 9. No person shall be recognised by the company as holding any share upon any trust, and the company shall not be bound by or recognise any equitable, contingent, future or partial interest in any share or any interest in

COMPANY—*continued.*

any fractional part of a share, or (except only as by these presents otherwise expressly provided) any other right in respect of any share except an absolute right to the entirety thereof in the registered holder thereof." " 12. The company shall have a first and paramount lien and charge on all the shares (not being fully paid up shares) registered in the name of a member (whether solely or jointly with others) for all moneys due to the company from him or his estate, either alone or jointly with any other person, whether a member or not, and whether such moneys are presently payable or not " :—

Held, that s. 27 of the Companies (Consolidation) Act, 1908, and article 9 (above) do not protect a company which in the face of notice that a shareholder is not the beneficial owner of the shares makes advances or gives credit to the shareholder.

In July, 1904, an owner and registered holder of 990 shares, partly paid up, in the defendant company, died, having by his will settled his residuary estate on trust for his widow and children. The plaintiffs and the widow and a son, James Hodgson, were his executors and trustees. The probate was sent to the company for registration, and the secretary, in returning it, drew attention to the articles of association, under which executors might be registered either themselves or through a nominee. They elected to be, and in due course were, registered themselves. In 1905 they sold 355 of the shares. In October of that year the plaintiff Mackereth, on behalf of a bank of which he was manager, gave notice to the company that 370 of the shares " of which the executors are the registered proprietors " had been deposited with the bank as security for money due or to become due to the bank. The secretary, in acknowledging the notice, drew attention to article 9 (stated above). In 1907 the widow died and the 635 shares were registered in the names of the three remaining executors, and the company's attention was again drawn to the fact that the shares were held by them as executors. In January, 1910, James Hodgson, on the advice of the executors' solicitors, wrote to the company asking for the certificate of 200 of the shares which had been deposited by the testator with the company as security and had been retained by the company, and the secretary forwarded it to him for the trustees, saying no doubt it ought to be in their keeping. At the same time James Hodgson, who had been appointed one of the company's agents, gave the company a bond to secure any future indebtedness from him as agent. Early in 1912 James Hodgson, being indebted to the company, charged his interest in the testator's estate in favour of the company. The company's solicitors gave notice to each of the plaintiffs " as one of the trustees of the testator's will " that he had done so. At that time the company did not appear to think it had any lien on the shares standing in the executors' names for James Hodgson's debt, but in August—having in July obtained judgment against him—claimed to retain the dividends by virtue of article 12 (stated above), and in February, 1913, again retained the dividends. In May, 1913,

COMPANY—*continued.*

the company registered a transfer to a nominee of the bank of the 370 shares charged to the bank, but continued to assert a lien for James Hodgson's indebtedness on the remaining 265 shares, and in June, 1913, sold those shares and applied the proceeds in reduction of James Hodgson's debt. In March, 1914, James Hodgson ceased to be a trustee. In an action against the company for wrongful dealing with the shares and dividends :—

Held, that the company was wrong in asserting a lien against the beneficial owners of the shares and must account for the proceeds of sale and for the dividends which had been applied towards the satisfaction of James Hodgson's indebtedness.

Rearden v. *Provincial Bank of Ireland* [1896] 1 I. R. 532 approved and followed. MACKERETH *v.* WIGAN COAL AND IRON CO. **Peterson J. 293**

6. —— *Reserve Fund—Tenant for Life and Remainderman—Exchange of Shares for Shares in New Company—Distribution of Reserve Fund by Way of Dividend.*

The Cambrian, a working colliery company, had accumulated out of profits a large reserve fund invested in the shares of a trust company which also held shares in three other working colliery companies. In 1913 a combine company was incorporated for the purpose of acquiring the shares in all four working companies, the shareholders in which were offered the opportunity of exchanging their shares for shares in the Combine on advantageous terms, and practically the whole of the shareholders availed themselves of the offer and deposited their shares under a provisional agreement by which provision was made for the deposit in a bank of the share certificates in the four working companies and for the allotment in exchange of shares in the Combine. The annexed scheme set out the rate of exchange in the case of each of the four working companies, and under the heading dealing with the Cambrian added a note that the Cambrian's assets in the Trust Company (referring to the reserve fund) would be distributed among the Cambrian's ordinary shareholders. Immediately after the adoption of the provisional agreement the directors of the Trust Company exchanged all shares held by that company in the three other working companies for shares in the Combine, and subsequently went into liquidation. Other steps were taken, and a resolution was passed by the Cambrian for the distribution of the assets to be received by the Cambrian in the liquidation of the Trust Company, representing the reserve fund, by way of dividend amongst their ordinary shareholders. As the result of these transactions the shares in the Combine thus acquired by the Cambrian and some cash were distributed among their ordinary shareholders. On a summons taken out by trustees raising the question whether the shares and cash so distributed to them ought as between tenant for life and remaindermen to be treated as capital or income :—

Held, affirming the decision of Sargant J. [1916] 1 Ch. 383, that the scheme proceeded on the footing of a distribution of the reserve fund as undivided profits by way of dividend and not by way of reduction of capital; that, looking at the real transaction, there was no intention to capitalize the reserve fund; and that the shares and cash in the hands of the trustees must be treated as income and not as capital. *In re* THOMAS. ANDREW *v.* THOMAS **C. A. 331**

7. —— *Winding up — Assets — Arrears of Preferential Dividends—Direction to pay out of Surplus Assets—No Dividends declared—To what Extent Arrears payable.*

A company's capital included 15,000 preference shares of 1*l.* each on which 15*s.* 6*d.* only had been paid. The preference shareholders were entitled to a cumulative preferential dividend of 10 per cent. per annum on the amount paid up on their shares, and in a winding up to have the surplus assets applied, first, in paying off their capital; secondly, in paying the arrears (if any) of the preferential dividend to the commencement of the winding up, and to have the residue, after payment of the capital of the ordinary shares, divided between the ordinary and preference shareholders in proportion to the amount paid up on their shares.

The articles of association provided that no dividends should be declared except out of profits. No dividends had ever been declared, and the last balance-sheet of the company, issued in September, 1914, showed a loss on profit and loss account to date of 9000*l.* The company went into voluntary liquidation on September 3, 1915. The company held a large stock of antimony, and this had so risen in price that the surplus assets were sufficient to cover the loss, pay all arrears of preferential dividends, and a dividend upon the ordinary shares. The liquidator took out this summons for directions how the surplus assets were to be divided :—

Held, that the arrears of preferential dividends payable could not be limited to dividends actually declared, and the holders of preference shares were entitled to be paid preferentially out of the surplus assets 10 per cent. per annum on the amount paid up on their shares from the date of their issue to the commencement of the winding up.

Semble, it would have made no difference if the surplus assets had not included any profits, but as there plainly were profits the point did not arise.

In re W. J. Hall & Co. [1909] 1 Ch. 521 discussed and (on the second point) not followed. *In re* NEW CHINESE ANTIMONY CO. **Neville J. 115**

8. —— *Winding up—"Just and equitable"—Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *s.* 129.

In 1914 W. and R., who traded separately as tobacconists and cigarette manufacturers, agreed to amalgamate their businesses, and in order to do so formed a private limited company in which they were the only shareholders and directors. The constitution of the company was such that

COMPANY—*continued.*

under the articles of association W. and R. had equal voting powers, one director was to form a quorum, and if any dispute or difference should arise consequent whereon inability to pass a directors' resolution should result, the matter in dispute should be referred to arbitration, the award to be entered in the minute-book as a resolution duly passed by the board. The company's business was successfully carried on until June, 1915, when differences arose between the parties. One of such differences was referred to arbitration, which, after a protracted hearing involving costs exceeding 1000*l.*, resulted in an award to which R. declined to give effect. He brought an action for fraudulent misrepresentation against W., and the parties became so hostile that neither of them would speak to the other, communications having to be conveyed between them through the secretary of the company. In spite of this the company continued to transact business and large profits were made. Under these circumstances W. presented a petition alleging that a complete deadlock had arisen, that the substratum of the company was gone, and that it was "just and equitable" within s. 129 of the Companies (Consolidation) Act, 1908, that a winding up order should be made:—

Held, affirming the decision of Astbury J., that if this were a case of partnership there would clearly be grounds for a dissolution, and that the same principle ought to be applied where there was in substance a partnership in the guise of a private company. The position amounted to a complete deadlock, and it was "just and equitable" that the company should be wound up. *In re* YENIDJE TOBACCO CO. - **C. A.** 426

9. —— *Winding up — Proof — Managing Director—Appointment for One Year certain—Salary and Commission—Loss of Salary—Loss of Prospective Commission—Loss of Option to take up Shares and hold Salaried Office for Ten Years —Implied Condition as to Exercise of Option.*

By an agreement dated July 20, 1915, a company and its three life directors who held all the issued capital appointed the applicant managing director for one year as from July 1, 1915, at a salary of 5*l.* a week and a commission of 5 per cent. on the amount realized from and paid upon all sales effected of the company's goods. By clause 5 the company and the three directors granted the applicant the right on applying to the company therefor and paying for the same at par within one year from July 1, 1915, to acquire from the company shares equal to one third of the share capital issued at that date, and the directors undertook to procure an allotment accordingly. It was provided that if and when the applicant acquired the shares his commission should cease, but his employment should continue for ten years from July 1, 1915, at 5*l.* a week. He was not to part with the shares within the ten years without the written consent of the three directors.

On November 16, 1915, a compulsory winding up order was made before the applicant had exercised his option under clause 5.

On December 3, 1915, the applicant obtained employment with one of the directors who continued to carry on a similar business. He was engaged at 5*l.* a week without commission and subject to a week's notice.

On January 22, 1916, the applicant sent in a proof claiming:—

(*a*) Arrears of salary and commission up to the winding up;

(*b*) Damages for loss of salary from the winding up to June 30, 1916;

(*c*) Damages for loss of commission during the same period;

(*d*) Damages for loss of his option to take up shares and obtain a ten years' appointment.

On April 13, 1916, the liquidator admitted the proof (*a*) as to arrears of salary and commission up to the winding up, and (*b*) as to salary up to the date that the applicant obtained his new employment. He rejected the rest of the proof.

On May 3, 1916, the applicant appealed and claimed to have the proof allowed in full.

At the hearing on May 16, 1916, the applicant admitted that his present employment, though throughout precarious, would in all probability continue till June 30, 1916, but contended that the damages ought to be assessed as at the date of the breach of contract having regard to the then probability of his obtaining full employment for the term:—

Held, that, in the circumstances, the applicant had not proved any damages for loss of salary under head (*b*) beyond what the liquidator had allowed.

Held by Astbury J. and the Court of Appeal, that the claim for damages for loss of commission under head (*c*) was not maintainable.

Ex parte Maclure (1870) L. R. 5 Ch. 737; *Cowasjee Nanabhoy* v. *Lallbhoy Vullubhoy* (1876) L. R. 3 Ind. Ap. 200; and *Hamlyn* v. *Wood* [1891] 2 Q. B. 488 applied.

Turner v. *Goldsmith* [1891] 1 Q. B. 544 distinguished.

Held, also, that clause 5 implied that any application for shares thereunder must be made while the company was in existence (see *Taylor* v. *Caldwell* (1863) 3 B. & S. 826), and as the applicant had not fulfilled the condition precedent to obtaining a ten years' appointment, he was not entitled to damages under head (*d*). *In re* R. S. NEWMAN, LD. RAPHAEL'S CLAIM - **C. A.** 309

COMPANIES (CONSOLIDATION) ACT, 1908.
See COMPANY.

CONDITION—Implied. - - - - - 309
See COMPANY. 9.

CONFLICT OF LAWS—*Lex loci contractus—Lex situs — Foreign Immovables — Equitable Charge—Legal Mortgage—Insolvency of Mortgagor's Estate—Rights of Creditors.*

By a deed of October 9, 1907, a testator, in consideration of 1000*l.* then expressed to be owing by him to his two sisters, charged all his share and interest in an estate in the island of Dominica, West Indies, to secure the repayment of this sum, and of such further sums as should thereafter be advanced by his sisters, and he agreed to execute a legal mortgage of the said property to them to secure all such principal

CONFLICT OF LAWS—*continued.*
money and interest, whenever required to do so. On July 17, 1912, a further charge for 1000*l.* on the same property was indorsed upon the first deed. By his will the testator gave all his estate wherever situated to trustees upon certain trusts, and died insolvent in 1913 without having executed any legal mortgage of the property. By the law applicable to immovables in Dominica the equitable charge was not sufficient to create a valid incumbrance upon this property.

Upon a summons issued by the two sisters in a creditors' action for the administration of the testator's estate :—

Held, that the sisters were entitled to have a legal mortgage of the foreign land executed in their favour to secure the moneys intended to be secured by the two documents. The contract was to be construed by the law of England, and the death of one of the parties could not operate to change the law by which it was to be construed and prejudice the right of the other party to have specific performance.

British South Africa Co. v. *De Beers Consolidated Mines* [1910] 2 Ch. 502 followed. *In re* Smith. Lawrence *v.* Kitson - **Eve J. 206**

CONSIDERATION, STATEMENT OF **527**
See Bill of Sale.

CONSTRUCTION—Will.
See Will.

CONTINGENCY—Bequest to children when the youngest attains thirty — Children dying under thirty not excluded—Remoteness - - - - **26**
See Will. 5.

CONTINUOUS AND APPARENT EASEMENT.
See Easement.

CONTRACT—*Sale of Article to be erected on Premises of Purchaser—Sub-contract—Property in Incomplete Article—Lien of Sub-contractor for Purchase-money—Delivery of Materials—Passing of Property—Sale of Goods Act,* 1893 (56 *&* 57 *Vict. c.* 71), *s.* 18, *r.* 5.

The defendant company contracted with C. to provide an electrical installation, including, inter alia, a storage battery, at her house for 1363*l.* The defendant company then sub-contracted with the plaintiffs for the supply of the battery to be erected by them on C.'s premises at the price of 286*l.*, including erection. In accordance with the terms of the sub-contract the plaintiffs sent the materials for the battery by rail to a specified station, whence they were to be carted by the defendant company to C.'s premises and there erected by the plaintiffs. The defendant company carted the goods, but the plaintiffs did not proceed with the erection of the battery, which was ultimately completed by the defendant company, who went into liquidation.

In an action against C. (to which the company was added as a defendant), C., in pursuance of an order (made by the Master upon a summons for directions), paid into Court the sum of 269*l.*, part of the balance owing by her to the defendant company, and upon that proceedings were stayed as against her :—

Held, (1.) upon construction of the sub-contract, that it was not a contract for the sale of a completed article, but of the component parts of the battery, with a supplemental contract that after delivery they should be erected on C.'s premises ; that the delivery of the parts was an unconditional appropriation to the contract of goods in a deliverable state within s. 18, r. 5, of the Sale of Goods Act, 1893, and that the property therein passed to the defendant company ; and (2.), assuming that the property in the goods did not pass, the plaintiffs had no lien upon the money in Court, which represented a portion of the consideration payable by C. to the defendant company under the principal contract.

Decision of Sargant J. reversed.

Bellamy v. *Davey* [1891] 3 Ch. 540 doubted and distinguished. Pritchett & Gold and Electrical Power Storage Co. *v.* Currie **C. A. 515**

CONTRACT OF SERVICE.
See Copyright.

CONVERSION.
See Partnership.

CONVEYANCERS—Practice of - **8**
See Vendor and Purchaser. 1.

COPYHOLDS - - - - - - **75**
See Will. 6.

COPYRIGHT—*Examination Papers—" Original literary work "—" Contract of service "—Assignment—Right to sue—" Fair dealing "—Infringement—Copyright Act,* 1911 (1 *&* 2 *Geo.* 5, *c.* 46), *s.* 1, *sub-s.* 1 ; *s.* 2, *sub-s.* 1 (*i.*) ; *s.* 5, *sub-s.* 1 (*b*) ; *s.* 35, *sub-s.* 1.

Papers set by examiners are " literary work " within the meaning of the Copyright Act, 1911.

Examiners were appointed for a matriculation examination of the University of London, a condition of appointment being that any copyright in the examination papers should belong to the University. The University agreed with the plaintiff company to assign the copyright, and by deed purported to assign it, to the plaintiff company. After the examination the defendant company issued a publication containing a number of the examination papers (including three which had been set by two examiners who were co-plaintiffs), with criticisms on the papers and answers to questions. In an action for infringement of copyright :—

Held, that copyright subsisted in the examination papers as " original literary work " within the meaning of s. 1, sub-s. 1, of the Copyright Act, 1911 ; that the copyright vested in the examiners ; that the examiners were not " in the employment " of the University " under a contract of service " within the meaning of s. 5, sub-s. 1 (*b*) ; that the examiners were subject to an obligation under their appointment to assign the copyright to the University or as the University might direct ; that, the University having assigned its rights to the plaintiff company, the plaintiff company was equitably

COPYRIGHT—*continued.*
entitled to the copyright; that the plaintiff company, having joined two of the examiners as co-plaintiffs, could sue for infringement of copyright in the papers set by the two examiners, but must fail as to the papers set by the other examiners; and that the defendant company, having failed to bring itself within the protection of s. 2, sub-s. 1 (i.), had infringed the copyright in the papers set by the co-plaintiffs. UNIVERSITY OF LONDON PRESS, LD. *v.* UNIVERSITY TUTORIAL PRESS, LD. - - **Peterson J. 601**

COSTS — *Apportionment — Practice — Chancery Division—Rules of the Supreme Court,* 1883, *Order* LXV., *r.* 2.

The addition made in 1902 to Order LXV., r. 2, of the Rules of the Supreme Court, 1883, made an alteration in the practice of the Chancery Division, and is a rule of construction of orders in the form referred to in the first part of the added words. Where, therefore, an order is made giving a plaintiff part of the relief asked for and ordering taxation of his costs of the action, except so far as it relates to specified claims on which he has failed, and ordering taxation of the defendant's costs of those claims, with a direction as to set-off, the plaintiff is entitled to the general costs of the action and the defendant is not entitled to have them apportioned.

Todd v. *North Eastern Ry. Co.* (1903) 51 W. R. 333; 87 L. T. 710; 88 L. T. 112, distinguished. GEORGE HOLLOWAY & WEBB, LD. *v.* CROMPTON - - - - **Sargant J. 436**

2. —— *Public Authority—Action against—Dismissal for Want of Prosecution by neglecting to give Notice of Trial—"Judgment"—Solicitor and Client Costs—Practice—Public Authorities Protection Act,* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*b*) —*Rules of the Supreme Court,* 1883, *Order* XXXVI., *r.* 12.

An order under Order XXXVI., r. 12, dismissing an action for want of prosecution because the plaintiff has not given notice of trial within the time specified for so doing, with costs to be paid by the plaintiff, is a "judgment" within s. 1 (*b*) of the Public Authorities Protection Act, 1893, entitling the defendant to costs as between solicitor and client. GILBERT *v.* GOSPORT AND ALVERSTOKE U. D. C. - - **Sargant J. 587**

3. —— *Set-off — Solicitor's Lien — Independent Actions in Chancery and King's Bench Divisions—Actions arising out of same Transaction—Jurisdiction of Chancery Division to allow Set-off—Rules of the Supreme Court,* 1883, *Order* LXV., *r.* 14.

Prima facie the Court ought not, owing to the existence of a solicitor's lien, to refuse a set-off, if as between the parties to the action it would be fair and just to allow it, and if no fraud or imposition has been practised on the solicitor by collusion between them.

The plaintiff brought an action in the Chancery Division for an injunction to restrain the defendant from voting otherwise than in accordance with the plaintiff's direction in respect of certain shares which had been transferred to him by the plaintiff by way of mortgage to secure the repayment of a loan, and obtained an order with costs. The defendant had previously brought an action in the King's Bench Division for payment by the plaintiff of the arrears of interest then due on the loan and recovered judgment with costs. On an application by the defendant in the Chancery action that he might be at liberty to set off the costs ordered to be paid by him to the plaintiff against the sum ordered to be paid by the plaintiff to him in the King's Bench action:—

Held, that the Court had a discretion to allow a set-off.

Held, also, that, having regard to the fact that the plaintiff's claim in the Chancery action might have been raised by counter-claim in the King's Bench action, in which case a set-off would have been a matter of course, the Court ought to allow the set-off notwithstanding the plaintiff's solicitor's lien.

Reid v. *Cupper* [1915] 2 K. B. 147 followed.

Blakey v. *Latham* (1889) 41 Ch. D. 518 and *Bake* v. *French* [1907] 1 Ch. 428 not followed. PUDDEPHATT *v.* LEITH (No. 2) - **Younger J. 168**

—— Transfer.
See WILL.

COUNSEL—Leading—Employment of - **570**
See ACCUMULATIONS.

DAMAGES.
See COMPANY.

DEATH DUTIES.
See WILL.

DEBENTURES - - - - - - **353**
See MORTGAGE. 1.

DEBTS—Partnership.
See PARTNERSHIP.

DEDUCTION — Income tax — Agreement — Annual payment—Taxable income
See REVENUE. **345**

DEED—*Construction—Estate for Life by Implication.*

In 1860 S. by deed settled leasehold property of his own in trust for his daughters M. and R. "for and during the terms of their natural lives as tenants in common and not as joint tenants" and "from and immediately after the decease of the survivor of them . . . . then to the use of their [*sic*] respective child or children of the said M. and R. share and share alike as tenants in common and not as joint tenants."

M. died in 1867 leaving children. R. died in 1914 without having had a child:—

Held, that on the death of M., R. took a life estate by implication in the moiety of M., and that on the death of R. the children of M. took the whole of the settled property. *In re* STANLEY'S SETTLEMENT. MADDOCKS *v.* ANDREWS **Sargant J. 50**

DEFEASIBILITY - - - - - **586**
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See Will.

DISCOVERY.
See Interrogatories.

DISCRETION — Committee—Stock Exchange —Member—Application for re-election —Application refused—No duty to give reasons for refusal - - 211
See Stock Exchange.

DISMISSAL FOR WANT OF PROSECUTION —Action - - - - - 587
See Costs. 2.

DIVESTING—Gift to tenant for life—Remainder as to specific properties to testator's children—Gift over if child should "die without leaving legal issue"—Period of division - - - - - 42
See Will. 14.

DIVIDEND—Reserve fund - - - 331
See Company.

DOMICIL—English—Specific bequest of foreign chattels - - - - - 268
See Will. 8.

EASEMENT — *Water — Underground Pipe — Severance of Two Tenements—Appurtenances—Continuous and "Apparent" Easement—Implied Grant as between the two Tenements—Water conducted from Well on Stranger's Tenement—Well fed by Percolation—No Grant from Stranger—Twenty Years' Enjoyment—Clam—Precario—Jus tertii.*

Testator, who died in 1902, by his will made in 1898 devised Blackacre, of which he was then in occupation, and the appurtenances to the plaintiff's predecessors in title, and Whiteacre and the appurtenances to the predecessor in title of the present owner, whose husband and gardener were the defendants.

Blackacre was supplied with water by an underground pipe leading from a stone well at Greenacre through Whiteacre. This pipe was openly laid by the testator in 1893, but there was no evidence as to what (if any) arrangement was made with the then owner of Greenacre. The supply was originally used for the house and garden of Blackacre, but after 1894 it was used for the garden only, though the house connection was still available.

The well was fed by percolation from some untraceable spring, and the supply was practically continuous. The well had long since been covered by a stone slab and sods, and when the present owner of Greenacre bought in 1912 he was unaware of the existence of the well or the pipe and was told there were no easements.

The present owner of Whiteacre purchased in 1913 without notice of the existence of the pipe or any easement. In 1914 a new carriage drive was made through Whiteacre, and the pipe being then discovered and found to be in the way, the defendants, as agents of the owner, who was abroad, cut and removed part of it and stopped the flow of water, whereupon the plaintiff brought an action for an injunction:—

Held, that the effect of the will was to devise Blackacre with the right of passage of such water as might flow through the pipe, and to devise Whiteacre subject to that right.

Phillips v. *Low* [1892] 1 Ch. 47 and *Wheeldon* v. *Burrows* (1879) 12 Ch. D. 31 followed.

Held, also, that the pipe easement, not being determinable at the will of the owner of the alleged servient tenement Whiteacre, was not precarious as between the owners of Blackacre and Whiteacre, and was therefore capable of creation by implied grant.

Dictum of Lord Abinger C.B. in *Arkwright* v. *Gell* (1839) 5 M. & W. 203, 233, approved.

Held, also, that the defendants were not entitled to rely on an alleged jus tertii in the owner of Greenacre to stop the water on the ground that the enjoyment against him had been "clam," and that his well was only fed by percolating water.

Held, also, that, the easement being one which depended not on implied covenant, but implied grant, the maxim that a grantor cannot derogate from his own grant applied, and that the present owner of Whiteacre could not therefore rely on the equitable defence of being a purchaser for value without notice.

Held, also, that the condition that the enjoyment must be nec vi, nec clam, nec precario, was a condition necessary to the acquisition of an easement by prescription and had no reference to and was in fact in the nature of things excluded where the acquisition was by grant.

Dictum of Pollock C.B. in *Wood* v. *Waud* (1849) 3 Ex. 748, 779, explained.

Decision of Astbury J. [1916] 2 Ch. 120 affirmed. Schwann *v.* Cotton - **C. A. 459**

ELECTION—Directors - - - - - 325
See Company. 3.

EMERGENCY LEGISLATION — *Contract — Specific Performance—Cottage let at Yearly Rental of Less than 26l.—Lease for Ninety-nine Years in Consideration of Premium and Annual Rent—Validity—Increase of Rent and Mortgage Interest* (*War Restrictions*) *Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 97), *s.* 1, *sub-ss.* 1 (iii.), 2; *s.* 2, *sub-s.* 2.

By s. 1, sub-s. 2, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, "A person shall not in consideration of the grant . . . . of a tenancy of any dwelling house to which this Act applies require the payment of any fine, premium, ... in addition to the rent, and where any such payment has been made in respect of any such dwelling-house after 25th day of November, 1915, then the amount

EMERGENCY LEGISLATION—*continued.*
shall be recoverable by the tenant by whom it was made from the landlord . . . ."

In January the defendant offered for sale by public auction certain cottage properties upon the terms that the purchaser of each cottage lot should have the right to have granted to him a lease thereof for ninety-nine years from February 22, 1916, at a nominal yearly rent varying from 15*s.* to 1*l.*, and according to a form of lease set forth in the particulars of sale. At the auction R. became the purchaser of one of the lots, a ninety-nine years' lease of a cottage, at the price or premium of 55*l.*, and at a rent of 1*l.* per annum; and D. became the purchaser of another lot, a similar lease of a cottage then in his own occupation, at the price or premium of 57*l.* 10*s.*, and at the same yearly rent. The cottages were put up for sale by the defendant in ignorance of the passing of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which received the Royal assent on December 23, 1915. On becoming aware of the passing of the Act the defendant declined to complete, and thereupon D. and R. commenced actions for specific performance of their contracts. No possession had been taken by either R. or D. under the contracts. It was clear that both cottages were dwelling-houses to which the Act applied, and that the purchase-money, if paid, would be a "premium" within the meaning of s. 1, sub-s. 2, of the Act :—

Held, that notwithstanding that the term to be granted was ninety-nine years, the leases would create tenancies within the Act, and that the payments therefore of the sums for which R. and D. had purchased their cottages were premiums which the defendant was prohibited by s. 1, sub-s. 2, from retaining.

Held, also, that the agreements to pay the premiums being illegal, and no possession having been taken under the contracts by either R. or D., the defendant was entitled to be relieved altogether from the contracts upon repaying to R. and D. all moneys he had received under them. REES *v.* MARQUIS OF BUTE. DAVIES *v.* MARQUIS OF BUTE - - - - Younger J. 64

—— Statute — Retrospective operation — Suspension of remedy—Interference with rights—Mortgagee's right of foreclosure—Taking "any steps for exercising" - - - - - - 1
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EXECUTION OF TRUSTS — War facilities — Delegation to co-trustee - - 289
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See ACCUMULATIONS.

—— Surplus—Annuity - - - - 563
See ANNUITY.

INCOME TAX.
See REVENUE and SETTLED LAND.

INCREASE OF RENT AND MORTGAGE INTEREST (WAR RESTRICTIONS) ACT, 1915 - - - - - 1
See STATUTE.

INDEMNITY—*Assignability to Principal Creditor—Married Woman Debtor—Fruitless Judgment against Separate Property—Amount recoverable under Indemnity.*

The plaintiff company recovered judgment against a married woman in respect of unpaid calls on shares against which the defendant had indemnified her. Not having any separate property, she assigned the benefit of her right of indemnity to the plaintiff company, who, after written notice of the assignment, sued the defendant for the full amount of their judgment:—

Held, that although the married woman had paid nothing, nevertheless she was entitled to have the amount of the calls paid by the defendant either to the plaintiffs or to herself; that this right was capable of assignment; and that the plaintiffs as assignees were entitled to have it enforced by an order directing payment to themselves.

Decision of Astbury J. [1916] 2 Ch. 152 affirmed.

In re Perkins [1898] 2 Ch. 182 applied.

Rendall v. *Morphew* [1914] W. N. 422; 84 L. J. (Ch.) 517, and *British Dominions General Insurance Co.* v. *Duder* [1915] 2 K. B. 394 distinguished.

Inasmuch as the measure of the liability of the indemnifier is the liability, not the capacity, of the indemnified to pay, the fact that the married woman had no immediate separate property afforded no defence to the action, because the liability under the judgment remained and could be enforced against any future separate property she might acquire.

Semble that, in the case of an insolvent debtor, the result of the decisions is to give to a contract to indemnify him the same effect as if it were a guarantee to the principal creditor of payment of the debt. BRITISH UNION AND NATIONAL INSURANCE CO. *v.* RAWSON - - **C. A. 476**

INFANT—Maintenance—Settlement—Clause limiting trustees' discretion—Father's rights—Repugnancy—Public policy
See SETTLEMENT. 304

INFRINGEMENT—Copyright - - 601
See COPYRIGHT.

INSURANCE (LIFE)—*Deposit—Amalgamation—Dissolution of Vendor Company—Carrying over Deposit—Assurance Companies Act,* 1909 (9 *Edw.* 7, *c.* 49), *ss.* 2, 3, 13.

Where an assurance company sells its business and assets to another assurance company, and the vendor company is dissolved and there are outstanding policies—such as paid-up policies—the holders of which have not novated with the purchaser company, the Court will not order the 20,000*l.* deposit of the vendor company to be paid out to or transferred simpliciter to the account of the purchaser company, but will order the fund to be carried over to a separate account of the purchaser company "in respect of the life assurance business of the" vendor company "now dissolved."

In re Popular Life Assurance Co. [1909] 1 Ch. 80 distinguished and explained.

In re CITY OF GLASGOW LIFE ASSURANCE CO.
Sargant J. 557

INTERROGATORIES—*Agent—Undisclosed Principal—Action against Agent alone—Amendment—Name of alleged Principal—Relevancy—Rules of the Supreme Court, Order* XXVIII., *r.* 12; *Order* XXXI., *r.* 1.

In an action by the vendor against the purchaser for specific performance of a contract of sale, the plaintiff is not entitled to interrogate the defendant for the purpose of discovering whether he was acting as agent for an undisclosed principal.

Leave to amend and to deliver interrogatories with this object refused. SEBRIGHT *v.* HANBURY - - - - **Younger J. 245**

INTESTACY - - - - - - - 570
See ACCUMULATIONS.

ISSUE.
See WILL.

JUDGMENT.
See COSTS.

JUS TERTII.
See EASEMENT.

LANDLORD AND TENANT—*Demise of Business Premises—Exception of existing Way or Passage and Basement underneath—Absolute Ownership—Style of Decoration—Common Intention—Demolition by Landlord—User as Cartway—No implied Obligation to maintain and use in original Condition—Trespass—Quiet Enjoyment—Temporary Annoyance.*

The defendants demised to the plaintiff a block of freehold business premises in Aldermanbury, in the city of London, excepting out of the demise "the way or passage and basement under

LANDLORD AND TENANT—*continued*
the same" shown on the plan and leading from Aldermanbury through the ground floor and underneath the first floor of the demised building to property of the defendants in rear of the block. The passage was entered from Aldermanbury through double doors, the floor was of concrete carried on iron girders and covered with mosaic and "Terrazzo," the walls were faced with glazed bricks, and there was a fireproof division between the passage and the first floor above it. Seventeen years after the grant of the lease the defendants proceeded to demolish the floor of the passage and remove the "tie" girders in order to make a timber cartway from the entrance in Aldermanbury down to the level of the basement in the rear of the building for the purpose of carting building materials and debris to and from the Guildhall across their property in rear of the demised premises. In an action by the plaintiff to restrain these proceedings and the resultant nuisance from noise:—

Held, (1.) on the construction of the lease, that the property in half the north wall and in the floor of the passage had been reserved to the defendants, and that they had not committed a trespass in removing the floor of the passage and the girders from the north wall.

(2.) that the defendants could use the passage for any purpose allowed by law not injuriously affecting the rest of the building, and that there was no implied obligation upon them to keep and use the passage and basement in the condition in which they were at the date of the lease.

Reilly v. *Booth* (1890) 44 Ch. D. 12 applied.

Lyttelton Times Co. v. *Warners* [1907] A. C. 476 and observations of Lord Parker in *Pwllbach Colliery Co.* v. *Woodman* [1915] A. C. 634, 646, 647, explained.

(3.) that the stability of the north wall had not been affected by the acts of the defendants; and

(4.) that there had been no breach of the defendants' covenant for quiet enjoyment, and that the annoyance, being temporary, did not constitute a cause of action.

Jenkins v. *Jackson* (1888) 40 Ch. D. 71, *Harrison* v. *Southwark and Vauxhall Water Co.* [1891] 2 Ch. 409, and *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* [1896] 2 Ch. 394, 401, applied. PHELPS *v.* LONDON (CITY) CORPORATION - - - - Peterson J. 255

LAPSE - - - - - - - - 368
See WILL. 15.

LEASE — Contract — Specific performance — Name of proposed lessee—Contract by agent - - - - - - 233
See VENDOR AND PURCHASER. 2.

LEGACY.
See WILL.

LEGACY DUTY.
See WILL.

LEGAL ESTATE—Mortgage - - - - 544
See MORTGAGE. 2.

LEX LOCI CONTRACTUS—Lex situs—Foreign immovables — Equitable charge — Legal mortgage—Insolvency of mortgagor's estate—Rights of creditors
See CONFLICT OF LAWS. 206

LEX SITUS—Lex loci contractus—Foreign immovables—Equitable charge—Legal mortgage—Insolvency of mortgagor's estate—Rights of creditors - - 206
See CONFLICT OF LAWS.

LIEN — Company — Partly-paid shares — Executors and trustees—Indebtedness of holder—Recognition of trust—Articles of association - 293
See COMPANY. 5.

—— Sub-contractor—Purchase-money - 515
See CONTRACT.

LIFE ESTATE—Implication - - - - 50
See DEED.

LIMITATION—Words of - - - - - 161
See WILL. 12.

LIMITATIONS, STATUTES OF—*Trustee—Administration—Originating Summons—Accounts —Order, Form of—Trustee Act,* 1888 (51 *&* 52 *Vict. c.* 59), *s.* 8.

Where an originating summons for accounts is issued against trustees or executors entitled under s. 8 of the Trustee Act, 1888, to limit their liability to six years before the date of the summons, the defence of the statute must be raised at the time the order to account is made, so that it may be qualified by a reference to the statute or the point may be reserved for the Court on the further consideration. Otherwise it will be too late to set up the statute for the first time on the hearing on further consideration, or even when the accounts are being vouched before the Master. *In re* WILLIAMS. JONES *v.* WILLIAMS
Neville J. 38

LITERARY WORK - - - - - - 601
See COPYRIGHT.

MAINTENANCE—Daughter—Trust for - 570
See ACCUMULATIONS.

—— Infant — Settlement — Clause limiting trustees' discretion—Father's rights—Repugnancy—Public policy - 304
See SETTLEMENT.

MARRIAGE SETTLEMENT — Protected life interest in settlor's own property—Determinable on bankruptcy and other events—Settlor adjudicated bankrupt —Life interest vesting in trustee—Indefeasibility of trustee's title—Purchaser - - - - - - 251
See BANKRUPTCY.

MARRIED WOMAN - - - - - 476
See INDEMNITY.

MEETING — Notice — Company — Increase of capital — Specifying amount of proposed increase - - - - - 57
See COMPANY. 1.

MEMORANDUM OF CONTRACT - - 233
See VENDOR AND PURCHASER. 2.

MINES—Settlement—Tenant for life—Rents and royalties - - - - 488
See SETTLED LAND. 1.

MORTGAGE—*Debentures—Settlement of—Transfer to Settlement Trustee—Non-registration of Transfer—Negligence of Trustee—Settlor's subsequent Equitable Mortgage by Deposit—Purchaser for Value without Notice—Claim by Beneficiary—Priorities.*

In 1893 forty-five debentures of a limited company secured by a trust deed were settled by the registered owner upon trusts for herself for life, with remainder to her three sons in equal shares, and she executed a deed of transfer of the debentures to C., who was the sole trustee of the settlement, and he had possession of the transfer and of the debentures, but he did not register his transfer in the books of the company. He was also the sole trustee of the debenture trust deed. In 1894 one of the sons assigned his one-third share, or fifteen of the debentures, to F. for value.

In 1911 the settlor, who was a director of the company and in some way then had possession of the forty-five debentures, deposited them with the bankers of the company as security for the company's overdraft and signed the usual declaration of charge. Before taking the charge the bank ascertained that the settlor was the registered owner of the debentures in the books of the company. The bank gave notice of their charge to C., as the trustee of the debenture trust deed, which he acknowledged, but made no reference to the settlement.

In 1914, after C.'s death, the bank first had notice of the settlement and of C.'s deed of transfer, and they at once took a transfer of the forty-five debentures from the settlor and were registered as the owners in the books of the company. In an action by F. and the executors of C. claiming fifteen of the debentures in priority to the bank:—

Held, that neither C.'s omission to register his transfer nor his silence when he received notice of the bank's charge estopped the plaintiffs from asserting their title; and also that F.'s assignment, being prior in date to the bank's charge, was the better in equity. COLEMAN *v.* LONDON COUNTY AND WESTMINSTER BANK, LD. - - - - - **Neville J. 353**

—— Equitable charge—Foreign immovables
See CONFLICT OF LAWS. 206

—— Foreclosure—Taking "any steps for exercising"—Statute — Retrospective operation—Suspension of remedy—Interference with rights—Increase of rent and mortgage - - - 1
See STATUTE.

2. —— *Partnership—Insolvency—Real Estate—Death of Partner—Will—Trust to pay Debts—Surviving Partner Residuary Legatee—Partnership Debts unpaid—Conveyance to Residuary Legatee—False Recital—Mortgage by Residuary Legatee—Legal Estate—Purchaser for Value without Notice—Conversion of Partnership Assets — Bankruptcy of Partnership — Priorities — Statute 13 Eliz. c. 5.*

The partnership deed of a banking business provided that the whole of the capital of the business as appearing in the private ledger of the bank belonged to the senior partner, T. B., and that on his death the surviving partners should have the option of purchasing his share of the business at its net value after providing for the liabilities of the business. The capital as appearing in the private ledger included the R. and S. estates, both freeholds; the legal estate of R. was in T. B. and the legal estate of S. was in T. B. and D. jointly, D. being a former partner.

In 1908 T. B. died, and by his will appointed P. and F. B. (his partners) and R. his executors, and devised and bequeathed to them all his real and personal estate upon trust for sale and thereout to pay his debts and testamentary and funeral expenses, and to hold the net balance upon trust for F. B.

At the death of T. B. the banking business was insolvent, its liabilities largely exceeded its assets, and he had no separate estate. The surviving partners concealed the insolvency of the bank by making false statements in their affidavit for probate of T. B.'s will, gave notice in February, 1909, to acquire the share of T. B., and continued to carry on the bank in the hope of restoring its solvency. By a deed dated April 29, 1912, the three executors of T. B., after reciting untruly that the debts of T. B. had been paid, conveyed as trustees to F. B. in fee simple the real estate of T. B., and by another deed dated April 30, 1912, after untrue recitals to the effect that T. B. at his death was absolutely entitled to the S. estate, the outstanding legal estate in S. was conveyed by D. to F. B. in fee simple. F. B. then mortgaged the R. and S. estates for 25,000*l.*, which sum was applied in reduction of the then overdraft of the surviving partners at their London agents. In negotiating the mortgage the title was deduced through T. B. and his will, the partnership deed and the insolvency of the bank not being disclosed. In 1914 the continuing partners became bankrupt, and at that date there were creditors of the bank who were creditors at the death of T. B. and were still unpaid. The trustee in bankruptcy sued the three executors of T. B. and the mortgagees, alleging that the R. and S. estates were part of the assets of the bank, that the deeds of April, 1912, were fraudulent and void under the statute 13 Eliz. c. 5, and claiming priority over the mortgagees for the creditors of the bank:—

Held, that the legal estate in R. and S. passed by the deeds of April, 1912, and that the mortgagees, being entitled by the terms of those deeds to suppose the trusts of T. B.'s will were at an end, and having the legal estate and being purchasers for value without notice of the real facts, were unaffected by any antecedent equities of the creditors of the bank.

Perham v. *Kempster* [1907] 1 Ch. 373 distinguished.

Held, also, that the deeds of April, 1912, were

MORTGAGE—*continued.*
not void under the statute 13 Eliz. c. 5, for they were not made with intent to defeat and delay the creditors of the bank, but with the object of carrying on the business and of paying them by that means.

Ex parte Mayou (1865) 4 D. J. & S. 664 distinguished.

Held, also, on the evidence, that the notice of February, 1909, was carried into effect, and that the two estates in question became assets of the surviving partners, who could deal with them.

The statement in Lindley on Partnership, 8th ed. pp. 400—401, that "in order that an agreement may have the effect of converting joint into separate estate, or vice versa, the agreement must be executed, and not be executory merely," explained. PEARCE *v.* BULTEEL
Neville J. 544

"NEAREST OF KIN OF MYSELF" - - 495
See WILL. 4.

NEGLIGENCE—Trustee - - - - - 353
See MORTGAGE. 1.

NON-REGISTRATION — Transfer — Debentures - - - - - - - 353
See MORTGAGE. 1.

NOTICE — Meeting — Company — Increase of capital—Specifying amount of proposed increase - - - - - 57
See COMPANY. 1.

—— Trust — Recital in deed — Practice of conveyancers - - - - - 8
See VENDOR AND PURCHASER. 1.

OBJECTIONS TO TITLE — Notice of trust — Recital in deed—Practice of conveyancers - - - - - - 8
See VENDOR AND PURCHASER. 1.

OBJECTS OF NATIONAL, SCIENTIFIC, HISTORIC, OR ARTISTIC INTEREST
See WILL. 8. 268

OPTION.
See COMPANY.

ORIGINAL LITERARY WORK - - 601
See COPYRIGHT.

ORIGINATING SUMMONS — Administration —Trustee—Accounts - - 38
See LIMITATIONS, STATUTES OF.

—— Leading counsel—Employment of - 570
See ACCUMULATIONS.

"PARENT" - - - - - - - 362
See WILL. 1.

PARTNERSHIP—Mortgage - - - - 544
See MORTGAGE. 2.

PASSING OF PROPERTY - - - 515
See CONTRACT.

PERPETUITIES—Rule against - - 413
See WILL. 16.

PERSON HAVING THE POWERS OF A TENANT FOR LIFE - - - 417
See SETTLED LAND. 3.

PRACTICE —Amendment - - - - 245
See INTERROGATORIES.

—— Costs.
See COSTS.

—— Interrogatories - - - - - 245
See INTERROGATORIES.

PRECARIO - - - - - - - 459
See EASEMENT.

PREFERENCE SHARES - - - - 450
See COMPANY. 2.

PRINCIPAL AND AGENT.
See INTERROGATORIES and VENDOR AND PURCHASER.

PRIORITIES.
See MORTGAGE.

PROOF.
See COMPANY.

PROPERTY PASSING TO "EXECUTOR AS SUCH" - - - - - - 268
See WILL. 8.

PROTECTED LIFE INTEREST.
See BANKRUPTCY.

PUBLIC AUTHORITIES PROTECTION ACT, 1893 - - - - - - 587
See COSTS. 2.

PUBLIC POLICY — Settlement — Infant — Maintenance — Clause limiting trustees' discretion—Father's rights—Repugnancy - - - - - 304
See SETTLEMENT.

PUBLIC TRUSTEE.
See TRUSTEE.

PURCHASER FOR VALUE WITHOUT NOTICE
See MORTGAGE. 2. 544

QUIET ENJOYMENT - - - - 255
See LANDLORD AND TENANT.

RECITAL - - - - - - - 8, 544
See MORTGAGE, 2, and VENDOR AND PURCHASER, 1.

REMAINDERMAN—Tenant for life and - 570
See ACCUMULATIONS.

REMOTENESS—Bequest to children when the youngest attains thirty — Children dying under thirty not excluded — Contingency not implied - 26
See WILL. 5.

RENTS AND ROYALTIES.
See SETTLED LAND.

RESERVE FUND.
See COMPANY.

RESIDUE - - - - - - - 570
See ACCUMULATIONS.

RESOLUTION—Extraordinary - - - - 57
See COMPANY. 1.

RETROSPECTIVE OPERATION — Statute — Suspension of remedy—Interference with rights—Mortgagee's right of foreclosure—Taking "any steps for exercising" - - - - - - 1
See STATUTE.

REVENUE — *Income Tax—Deduction—Agreement — Annual Payment — Taxable Income — Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *ss.* 102, 103.

In June, 1912, a decree absolute for the dissolution of the marriage between Mr. Owen Talbot Price and his wife was pronounced. She subsequently married Mr. J. H. Brooke. A deed was executed whereby Mrs. Brooke (who was possessed of large means under the will of her father, on which income tax was paid by trustees) charged all her income to which she was entitled under his will with the payment of certain sums and directed that the trustees of the will should out of the income received by them (which would otherwise be payable to her) during the joint lives of O. T. Price and Betty G. Price, the only child of the marriage, the custody of whom had been given to her father, pay to O. T. Price for their maintenance an annual sum equal to one fourth part of the annual net income (after income tax on the whole income of Mrs. Brooke had been paid), or if that amounted to less than 2500*l.* a year, then the clear annual sum of 2500*l.* a year (without deducting income tax therefrom).

Mrs. Brooke took out a summons to determine the question whether on the true construction of the deed when the one fourth share became less than 2500*l.* a year the sum payable to O. T. Price for maintenance was payable less income tax; and whether the provisions of the deed making that sum payable without deduction of income tax were not void under ss. 102 and 103 of the Income Tax Act, 1842; and asking for a declaration that Mrs. Brooke was entitled to deduct the tax accordingly:—

Held, affirming the decision of Neville J., that the annuity not being payable out of taxable income was not within the provisions of s. 102, and therefore that Mrs. Brooke was not entitled to deduct income tax. BROOKE *v.* PRICE **C. A. 345**

—— Estate duty—Legacy duty - - 268
See WILL. 8.

RIGHT TO SUE - - - - - - 601
See COPYRIGHT.

RULES OF THE SUPREME COURT, Order XXVIII., r. 12; Order XXXI., r. 1: SEBRIGHT *v.* HANBURY - - 245

—— **Order XXXVI.,** r. 12: GILBERT *v.* GOSPORT AND ALVERSTOKE U. D. C. - 587

RULES OF THE SUPREME COURT—*continued.*

—— **Order LV., r. 63:** *In re* FRIED KRUPP AKTIEN-GESELLSCHAFT - - 194

—— **Order LXV., r. 2:** GEORGE HOLLOWAY AND WEBB, LD. *v.* CROMPTON - 436

—— —— r. 14: PUDDEPHATT *v.* LEITH (No. 2) 168

SALARY—Commission.
See COMPANY.

SALE—Article to be erected on premises of purchaser - - - - - 515
See CONTRACT.

SERVANTS—Legacy to - - - - 386
See WILL. 2.

SERVICE—Contract of - - - - 601
See COPYRIGHT.

SETTLED SHARE—Annuity—Payable out of income - - - - - - 563
See ANNUITY.

SETTLED LAND — *Tenant for Life — Mines falling into Settlement—Rents and Royalties—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 11.

Sect. 11 of the Settled Land Act, 1882, governs the distribution, as between the limited owner and the remaindermen under a settlement, of the rents and royalties derived from mining leases granted under the powers of the Act by the person having the limited interest under such settlement, but it does not affect the rights of the limited owner and remaindermen under a subsequent settlement to which mines already demised have become subject, and in such a case those rights are governed either by the provisions of the settlement or by the law relating to open mines.

The plaintiff was entitled under his marriage settlement, made in 1886, during his life, to the rents, until sale, of one undivided third part, thereby settled, of certain mines devised and settled by the will of his father. In 1895 and 1902 he joined with the tenant for life of one other third part and the owner in fee of the remaining third part in granting leases of the mines. Subsequently one half of one of the other third shares devolved upon the plaintiff subject to the leases, and being caught by the terms of the conveyance in his marriage settlement became subject to it:—

Held, that the plaintiff was entitled, during his life or until sale, to receive the whole of the rents and profits derived from the one sixth share in question during the continuance of the leases. *In re* HALL. HALL *v.* HALL
Peterson J. 488

2. —— *Tenant for Life — Persons having Powers of Tenant for Life—Will—Direction to allow Children to occupy House while unmarried—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 5; *s.* 58, *sub-s.* 1 (vi.).

At the dates of his will and death testator was lessee for a long term of a house called "The Grange," which he and his wife and family occupied at the same two dates. By his will

SETTLED LAND—*continued.*
testator devised "The Grange" specifically to his trustees, upon trust to permit his wife during her life to occupy it, she paying all rents, rates, taxes, assessments, and outgoings in respect of it, and observing and performing the covenants on the part of the lessee contained in the lease thereof, and with permission also to use and enjoy the testator's effects in "The Grange." And testator provided that after her death the trustees were to hold "The Grange" upon trust to permit "such one or more of my children who shall for the time being be unmarried and shall desire to reside in 'The Grange,' to occupy 'The Grange,' and use and enjoy my effects in 'The Grange' so long as any one or more of my said children shall remain unmarried and shall desire to reside there, he, she or they paying all rents, rates, taxes, assessments and outgoings in respect of 'The Grange,' and observing and performing the covenants on the part of the lessee contained in the said lease thereof." Then the will declared that, after the marriage of all the testator's children or the death of the last unmarried child, or in case all the unmarried children should notify to the trustees their desire not to reside in "The Grange," the trustees should hold "The Grange" and the effects therein upon similar trusts in favour of a married son, S., to those thereinbefore declared in favour of testator's wife. Then followed a similar provision (after a provision for S.'s children) for H., another son of the testator.

After the deaths of the testator and his widow, X. and Y. were the two youngest and the only unmarried children of the testator. They resided together at and expressed their desire to continue to reside at "The Grange," and raised the question whether they were tenants for life of that property within the meaning of the Settled Land Acts and entitled to exercise the powers given to tenants for life by the Acts:—

Held, that X. and Y., although not strictly tenants for life within the meaning of s. 2, sub-s. 5, of the Settled Land Act, 1882, had, under s. 58, sub-s. 1 (vi.), of that Act, the powers given by the Act to tenants for life.

Sect. 58 of the Act is to be interpreted broadly and includes persons who fall within the definition in s. 2, sub-s. 5, of a tenant for life. *In re* BOYER'S SETTLED ESTATES
Sargant J. 404

3. —— *Tenant for Life—Person having the Powers of a Tenant for Life—Tenants for Life subject to a Trust to accumulate all Rents for Ten Years and apply the same for making a Road—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 2, *sub-s.* 7; *s.* 58, *sub-s.* 1, *clause vi.—Bequest of Annuity "to be paid without deductions"—Income Tax—Payment by Trustees without deducting Income Tax—Mistake in Law—Right of Trustees to recoup themselves for Payments of Income Tax made by Mistake out of future Payments of Annuities.*

M. devised lands to four named grandsons as tenants in common for life with cross remainders between them, and directed that after the death of the survivor the same lands should fall into his residuary real and personal estate which was given upon other trusts. By a codicil the testator directed the trustees of his will to let the said lands by lease or otherwise and accumulate the rents for a period of ten years after his death and apply the accumulations towards the construction of a proposed carriage road over the Styhead Pass in Cumberland:—

Held, that the grandsons were, notwithstanding the term, persons who had the powers of tenants for life under the Settled Land Act, 1882, as being "a tenant for . . . . life . . . . whose estate . . . . is subject to a trust for accumulation of income for payment of debts or other purpose" and whose estate was in possession, within s. 58, sub-s. 1 (vi.), of the Settled Land Act, 1882.

By the same will the testator gave several annuities to his sons and others and directed that all annuities should be paid free of deduction. The trustees had paid the annuities for some years without deducting income tax:—

Held, that the annuities were not given free of income tax, but that the trustees were entitled to deduct the income tax they had paid out of residue from future payments of the annuities, on the ground that the Court will always in the administration of an estate, where possible, correct errors of account between trustees and cestuis que trust. The rule that a man cannot recover moneys paid under a mistake in law does not apply to such a case.

In re Ainsworth [1915] 2 Ch. 96 followed. *In re* MUSGRAVE. MACHELL *v.* PARRY
Neville J. 417

SETTLED LEGACIES.
See WILL.

SETTLED RESIDUE - - - - - 570
See ACCUMULATIONS.

SETTLED SHARE—Annuity—Payable out of income - - - - - - 563
See ANNUITY.

SETTLEMENT — *Infant—Maintenance—Clause limiting Trustees' Discretion—Father's Rights—Repugnancy—Public Policy.*

Under a voluntary settlement an infant was entitled to a share of 10,000*l.* stock in a limited company after the death of his mother, a daughter of the settlor, and also to further parts of settled stock contingently on his attaining twenty-one. The trustees of the settlement were empowered by clause 6 at their discretion to apply any part of the income of the 10,000*l.*, not exceeding 500*l.* a year, for the maintenance, education, and advancement or otherwise for the benefit of the infant, but by clause 9 no part of the income was to be applied for the maintenance, education, or otherwise for the benefit of the infant whilst he should be "in the custody or control" of his father, or his father should "have anything to do with his education or bringing up." The father had no income beyond his captain's pay in the Army and did not wish to give up the custody or control of the infant

SETTLEMENT—*continued.*

and his education. Nothing was alleged against his fitness to have the custody of his child.

Upon an application by the infant to obtain an allowance for maintenance:—

Held, that the condition affecting the father of the infant was not repugnant to the interest given by the settlement or contrary to public policy, and the trustees had therefore no discretionary powers of maintenance which they could exercise in the infant's favour.

In re Borwick's Settlement. Woodman *v.* Borwick. *In re* Woodman (an Infant) Eve J. 304

—— Debentures.
See Mortgage.

—— Settlement — Marriage — Protected life interest in settlor's own property 251
See Bankruptcy.

SHARES—Company.
See Company.

SHELLEY'S CASE, RULE IN - - - 161
See Will. 12.

SOLICITOR AND CLIENT COSTS.
See Costs.

SPECIFIC BEQUEST.
See Will.

SPECIFIC DEVISE.
See Will.

SPECIFIC LEGACIES.
See Will.

SPECIFIC PERFORMANCE—Vendor and purchaser - - - - - 187, 233
See Vendor and Purchaser. 2, 3.

STATUTE—*Retrospective Operation—Suspension of Remedy—Interference with Rights—Mortgagee's Right of Foreclosure—Taking "any steps for exercising"—Increase of Rent and Mortgage Interest (War Restrictions) Act*, 1915 (*5 & 6 Geo. 5, c.* 97), *s.* 1, *sub-s.* 4.

Sect. 1, sub-s. 4, of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, provides that "it shall not be lawful for any mortgagee under a mortgage to which this Act applies, during the continuance of this Act, and so long as" certain conditions are fulfilled, "to call in his mortgage or to take any steps for exercising any right of foreclosure or sale, or for otherwise enforcing his security or for recovering the principal money thereby secured."

A mortgagee, under a mortgage created in 1910, and to which the Act applied, before the Act came into operation issued a writ to enforce his security by foreclosure or sale, and applied by summons in chambers for an order nisi. It was admitted that all the conditions of s. 1, sub-s. 4, had been fulfilled by the mortgagor. The summons was adjourned to Eve J. after the Act had come into operation. He dismissed it on the ground that the Act was retrospective, and that by attending at the hearing of the summons the mortgagee was taking a step for exercising his right of foreclosure within the meaning of the section:—

Held, on appeal, that the Act did not take away any rights, but merely suspended a particular form of remedy. It related to a matter of procedure and therefore might operate retrospectively. Both the attending on the summons and the giving of the notice of appeal were "steps" within the section.

Decision of Eve J. affirmed. Welby *v.* Parker - - - - - - C. A. 1

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1571.

13 Eliz. c. 5: Pearce *v.* Bulteel - - 544

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29 Car. 2, c. 3 (Frauds), s. 4: Lovesy *v.* Palmer - - - - - 233

1800.

39 & 40 Geo. 3, c. 98 (Accumulations): *In re* Hawkins - - - - - 570

1842.

5 & 6 Vict. c. 35 (Income Tax), ss. 102, 103: Brooke *v.* Price - - C. A 345

1870.

33 & 34 Vict. c. 35 (Apportionment), ss. 2, 5: *In re* Muirhead - - - - 181

1882.

45 & 46 Vict. c. 38 (Settled Land), s. 2, sub-s. 5; s. 58, sub-s. 1 (vi.): *In re* Boyer's Settled Estates - 404

—— —— s. 2, sub-s. 7; s. 58, sub-s. 1, clause vi.: *In re* Musgrave - - 417

—— —— s. 11: *In re* Hall - - 488

45 & 46 Vict. c. 43 (Bills of Sale), ss. 7, 8: Parsons *v.* Equitable Investment Co. - - - - - C. A. 527

1888.

51 & 52 Vict. c. 59 (Trustee), s. 8: *In re* Williams - - - - - 38

1893.

56 & 57 Vict. c. 61 (Public Authorities Protection), s. 1 (*b*): Gilbert *v.* Gosport and Alverstoke U. D. C. - - 587

56 & 57 Vict. c. 71 (Sale of Goods), s. 18, r. 5: Pritchett & Gold and Electrical Power Storage Co. *v.* Currie C. A. 515

1894.

57 & 58 Vict. c. 30 (Finance), s. 1; s. 2, sub-s. 1 (*b*); s. 7, sub-s. 7 (*b*); s. 9, sub-s. 1: *In re* Palmer - - 391

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1896.

59 & 60 Vict. c. 28 (Finance), s. 20: *In re* SCOTT - - - - C. A. 268

1905.

5 Edw. 7, c. 15 (Trade Marks), ss. 11, 19, 49: *In re* BAGOTS, HUTTON & CO.'S TRADE MARK - - - - C. A. 109

1906.

6 Edw. 7, c. 55 (Public Trustee), s. 5: *In re* MOXON - - - - - 595

1908.

8 Edw. 7, c. 69 (Companies (Consolidation)), s. 27: MACKERETH *v.* WIGAN COAL AND IRON CO. - - - - 293

—— —— s. 93, sub-ss. 2, 3: *In re* FIREPROOF DOORS, LD. - - - - 142

—— —— s. 129: *In re* YENIDJE TOBACCO CO. - - - - - C. A. 426

—— —— Sched. I., Table A. clauses 41, 49, 50: MACCONNELL *v.* E. PRILL & CO. 57

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9 Edw. 7, c. 49 (Assurance Companies), ss. 2, 3, 13: *In re* CITY OF GLASGOW LIFE ASSURANCE CO. - - - 557

1910.

10 Edw. 7, c. 8 (Finance (1909 10)), ss. 63, 96: *In re* SCOTT - - - C. A. 268

1911.

1 & 2 Geo. 5, c. 46 (Copyright), s. 1, sub-s. 1; s. 2, sub-s. 1 (i.); s. 5, sub-s. 1 (*b*); s. 35, sub-s. 1: UNIVERSITY OF LONDON PRESS, LD. *v.* UNIVERSITY TUTORIAL PRESS, LD. - - - - 601

1914.

4 & 5 Geo. 5, c. 10 (Finance), s. 14: *In re* PALMER - - - - C. A. 391

5 Geo. 5, c. 12 (Trading with the Enemy Amendment), s. 5: *In re* FRIED KRUPP AKTIEN-GESELLSCHAFT - - 194

5 Geo. 5, c. 13 (Execution of Trusts (War Facilities)), s. 1: *In re* WELLS AND HOPKINSON'S CONTRACT - - 289

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5 & 6 Geo. 5, c. 70 (Execution of Trusts (War Facilities) Amendment), ss. 1, 2: *In re* WELLS AND HOPKINSON'S CONTRACT 289

5 & 6 Geo. 5, c. 97 (Increase of Rent and Mortgage Interest (War Restrictions)), s. 1, sub-s. 4: WELBY *v.* PARKER C. A. 1

—— —— s. 1, sub-ss. 1 (iii.), 2; s. 2, sub-s. 2: REES *v.* MARQUIS OF BUTE - 64

1916.

5 & 6 Geo. 5, c. 105 (Trading with the Enemy), s. 1, sub-ss. 3, 4, and 7: *In re* W. HAGELBERG AKTIEN-GESELLSCHAFT - 503

STOCK EXCHANGE — *Member — Application for Re-election—Discretion of Committee—Application refused—No Duty to give Reasons for Refusal.*

A member of the Stock Exchange is elected for one year only and comes up annually for re-election under rule 21, which provides that the committee shall on the first Monday in March proceed to re-elect such members and admit such candidates as they shall deem eligible to be members of the Stock Exchange for one year commencing on March 25 then instant.

Rule 35 provides that a member intending to object to the re-election of a member, the admission of a candidate, or the readmission of a defaulter shall communicate the grounds of his objection to the committee by letter previously to the re-election or ballot:—

Held, that a committee who in the bona fide exercise of their discretion under rule 21 do not deem an applicant eligible for re-election are not bound to give any reasons for their decision, and (*semble*) even if an individual objection were lodged under rule 35 they would not be bound to acquaint the applicant with the particulars of that objection so as to enable him to answer it.

Reg. v. *Ipswich Corporation* (1705) 2 Ld. Raym. 1232; *In re Wilkes's Charity* (1851) 3 Mac. & G. 440; *Hayman* v. *Governors of Rugby School* (1874) L. R. 18 Eq. 28; *Ex parte Penney* (1872) L. R. 8 Ch. 446; and *In re Coalport China Co.* [1895] 2 Ch. 404 applied.

Fisher v. *Keane* (1878) 11 Ch. D. 353; *Labouchere* v. *Earl of Wharncliffe* (1879) 13 Ch. D. 346; *Russell* v. *Russell* (1880) 14 Ch. D. 471; and *Rigby* v. *Connol* (1880) 14 Ch. D. 482 (expulsion cases); and *Board of Education* v. *Rice* [1911] A. C. 179 and *Local Government Board* v. *Arlidge* [1915] A. C. 120 (departmental tribunal cases) distinguished. CASSEL *v.* INGLIS Astbury J. 211

SUB-CONTRACT.
See CONTRACT.

SURPLUS INCOME—Accumulation of - 570
See ACCUMULATIONS.

—— Right of trustees to retain to meet possible deficiency in a future year—Annuity
See ANNUITY. 563

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See ACCUMULATIONS and COMPANY. 6.

THELLUSSON ACT - - - - - 570
See ACCUMULATIONS.

TITLE—Objections to - - - - 8
See VENDOR AND PURCHASER. 1.

TRADE MARK — *Registration — Cat — Gin — Similarity of Device—" Calculated to deceive "—Statutory Declarations—Trade Marks Act,* 1905 (5 *Edw.* 7, *c.* 15), *ss.* 11, 19, 49.

On an application by spirit merchants to register in class 43 for gin a trade mark consisting of a representation of a puss in boots in a particular position it appeared that by long usage a representation of a cat had become a mark commonly used by many members of the trade, and that the goods of one of the opponents of registration had become known in some Eastern countries as Cat goods ; and it was urged that the registration must cause confusion :—

Held, that this was only a bare possibility and did not make the applicants' mark " calculated to deceive " ; that there was not sufficient resemblance between the marks to lead to confusion ; and that the applicants, who had honestly used their mark for many years, ought not to be deprived of the privilege of registration on such grounds.

The practice of taking evidence by statutory declaration without cross-examination must not be abused.

Decision of Neville J. reversed. *In re* Bagots, Hutton & Co.'s Trade Mark - - **C. A. 103**

TRADING WITH THE ENEMY — *Company incorporated in Germany—Branch Business in England—Order of Board of Trade to wind up Branch Business—Appointment of Controller—Payment of Debts—Whether Creditors of Company entitled to share pari passu with Creditors of Branch Business—Trading with the Enemy Amendment Act,* 1916 (5 *&* 6 *Geo.* 5, *c.* 105), *s.* 1, *sub-ss.* 3, 4, *and* 7.

A company of printers and art publishers incorporated in the German Empire and having its principal place of business in Berlin established a branch in London which carried on business there on its behalf for some years before the outbreak of the present war. The principal business of the London branch was to sell to English firms goods printed by the company in Germany and to obtain orders from English firms for printing. The London business had its own capital account and made its own profit, which was the difference between the prices obtained for the goods and those at which they were invoiced by the company in Berlin, any net profits made by the London business, after providing for payment of expenses, being accounted for to the company at Berlin. For the purpose of the London business a banking account was opened with a bank in London, and this account was used rarely, if at all, by the Berlin house. The company had no other business in the United Kingdom. In April, 1916, the London business was ordered to be wound up, and a controller was appointed.

On an application by the controller under the Trading with the Enemy Amendment Act, 1916, for the determination of the question whether the creditors of the company were entitled to share pari passu with the creditors of the London business :—

Held, that the creditors referred to but not specified in sub-s. 3 of s. 1 of the Trading with the Enemy Amendment Act, 1916, were the creditors of the business as mentioned in sub-s. 4 and not the creditors of the company as mentioned in sub-s. 7, and accordingly that the creditors of the enemy company who were not enemies, but whose debts did not arise out of transactions or dealings in relation to the London business, were not entitled to share pari passu with the creditors whose debts had arisen by reason of transactions or dealings in relation to that business in the distribution of any sums or other property resulting from the realization of any assets of the business. *In re* W. Hagelberg Aktien-Gesellschaft - - - - - **Younger J. 503**

2. —— *Payment of Debts due from Enemy—Interest—Trading with the Enemy Amendment Act,* 1914 (5 *Geo.* 5, *c.* 12), *s.* 5—*Trading with the Enemy* (*Vesting and Application of Property*) *Rules,* 1915, *r.* 4—*Rules of the Supreme Court,* 1883, *Order* LV., *r.* 63.

Where the Court has made an order, to which the custodian was a consenting party, under s. 5, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, directing the custodian out of money in his hands to make a distribution in respect of debts due by the enemy, the creditors on establishing their debts in chambers are not entitled to interest at 4 per cent. per annum under Order LV., r. 63, of the Rules of the Supreme Court, 1883, on debts which do not carry interest. Rule 4, sub-r. 4, of the Trading with the Enemy (Vesting and Application of Property) Rules, 1915, made under s. 5, sub-s. 5, of the Act, does not incorporate Order LV., r. 63, for this purpose, or if it does, the rule so far is ultra vires.

While by s. 5, sub-s. 2, of the Trading with the Enemy Amendment Act, 1914, as amended by s. 12 of the Trading with the Enemy Amendment Act, 1916, the custodian is not empowered to pay out of the property paid to him in respect of an enemy the whole or any part of any debt due by that enemy unless so authorized by an order of the High Court or a judge thereof, the Court cannot require the custodian to make any such payment against his will. The decision whether payment shall or shall not be made rests ultimately with the custodian, subject only to the proviso that before paying any debt he must satisfy himself that he retains property paid to or vested in him in respect of the enemy in question sufficient to satisfy that debt and any other claims against that enemy of which notice verified by statutory declaration may have been served upon him.

Whatever be the ultimate destination of the funds in the hands of the custodian under the Order in Council hereafter to be made under s. 5, sub-s. 1, of the Trading with the Enemy Amendment Act, 1914, it is plainly desirable that no payment out of enemy money should be authorized by the Court which could not by law be justified as against the enemy himself. The fund should be kept intact for restoration, if need be, at the end of the war, less only such payments out of it for administration or otherwise as the enemy could not himself validly or reasonably object to if he were here to oppose them. *In re* Fried Krupp Aktien-Gesellschaft - - - - **Younger J. 194**

TRADING WITH THE ENEMY (VESTING AND APPLICATION OF PROPERTY) RULES, 1915, r. 4: *In re* FRIED KRUPP AKTIEN-GESELLSCHAFT - - 194

TRANSFER—Debentures - - - 353
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TRESPASS — Quiet enjoyment — Temporary annoyance - - - - - - 255
See LANDLORD AND TENANT.

TRUST—Maintenance—Daughter - - 570
See ACCUMULATIONS.

—— Notice of—Recital in deed—Practice of conveyancers - - - - - 8
See VENDOR AND PURCHASER. 1.

—— Payment of debts - - - - - 544
See MORTGAGE.

—— Recognition of — Company — Partly-paid shares—Executors and trustees — Indebtedness of holder — Lien — Articles of association - - 293
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—— Annuity — Right to retain surplus income to meet possible deficiency in a future year - - - - - 563
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1. —— *Execution of Trusts—War Facilities — Delegation to Co-trustee — Execution of Trusts (War Facilities) Act*, 1914 (5 *Geo.* 5, *c.* 13), *s.* 1—*Execution of Trusts (War Facilities) Amendment Act*, 1915 (5 *&* 6 *Geo.* 5, *c.* 70), *ss.* 1, 2.

The Execution of Trusts (War Facilities) Acts, 1914 and 1915, do not enable one of several trustees to delegate the execution of the trust to a co-trustee. *In re* WELLS AND HOPKINSON'S CONTRACT - - **Astbury J. 289**

2. —— *Public Trustee—Appointment as New Trustee — Direction in Trust Instrument that Number of Trustees shall not be Less than Three —Ability of Donee of Power to appoint Public Trustee as Sole Trustee—Trustee Act*, 1893 (56 *&* 57 *Vict. c.* 53), *s.* 10—*Public Trustee Act*, 1906 (6 *Edw.* 7, *c.* 55), *s.* 5.

Persons having the statutory power to appoint new trustees may appoint the Public Trustee to be sole trustee although the trust instrument expressly provides that upon any appointment of new trustees the number is not to be reduced below three. *In re* MOXON **Sargant J. 595**

UNDERGROUND PIPE.
See EASEMENT.

UNDISCLOSED PRINCIPAL—Interrogatories—Amendment - - - - - 245
See INTERROGATORIES.

UNIVERSITY — Examiners — Examination papers—Copyright - - - 601
See COPYRIGHT.

VENDOR AND PURCHASER — *Objections to Title—Notice of Trust—Recital in Deed—Practice of Conveyancers.*

An abstract of title delivered to a purchaser under a contract for sale of freeholds disclosed a recital in a partition deed that H. B. F. (one of the parties thereto) was then seised of the freeholds in question and other hereditaments "as trustee partly for himself and partly for L. R. (the other party to the deed) as he the said H. B. F. did thereby admit":—

Held by Younger J. and the Court of Appeal, that, the recital being clear and unambiguous in its terms and in itself a sufficient declaration of trust, the purchaser was not entitled to inquire how the trust was created.

Malpas v. *Ackland* (1827) 3 Russ. 273 explained and distinguished. *In re* CHAFER AND RANDALL'S CONTRACT - - **C. A. 8**

2. —— *Specific Performance — Contract — Lease—Name of proposed Lessee—Contract by Agent—Agent not liable as one of Contracting Parties —Right of Principal to sue—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4.

Where a contract to which s. 4 of the Statute of Frauds applies has been made by an agent in such terms that the agent is not himself liable as one of the contracting parties, the principal can sue on it only if his name appears in the memorandum of the contract or his identity from the description of him therein appearing cannot fairly be disputed.

Rossiter v. *Miller* (1878) 3 App. Cas. 1124 and *Jarrett* v. *Hunter* (1886) 34 Ch. D. 182 followed.

Filby v. *Hounsell* [1896] 2 Ch. 737 discussed. LOVESY *v.* PALMER - - - **Younger J. 233**

3. —— *Specific Performance—Contract contained in Letters — Offer and Acceptance — Subsequent Correspondence.*

Though when a contract is alleged to be contained in letters the whole correspondence should be looked at, yet if once a definite offer has been made and accepted without qualification, and it appears that the letters of offer and acceptance contain all the terms agreed on between the parties at the date of the acceptance, the complete contract then arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot without the consent of both get rid of the contract already arrived at.

Statement of the law by North J. in *Bellamy* v. *Debenham* (1890) 45 Ch. D. 481 and his criticism upon observations of Kay J. in *Bristol, Cardiff and Swansea Aerated Bread Co.* v. *Maggs* (1890) 44 Ch. D. 616 approved.

Hussey v. *Horne-Payne* (1879) 4 App. Cas. 311 distinguished.

Decision of Sargant J. affirmed. PERRY *v.* SUFFIELDS, LD. - - - - **C. A 187**

VESTING—Bequest to children when the youngest attains thirty — Children dying under thirty not excluded—Contingency not implied—Remoteness - - - - - - 26
See WILL. 5.

WAR FACILITIES—Execution of trusts.
See TRUSTEE.

WATER.
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WAY—Exception of.
See LANDLORD AND TENANT.

WILL—Accumulation - - - - - 570
See ACCUMULATIONS.

1. —— *Ambiguity*—"*Issue*"—"*Parent.*"

Testatrix gave her residuary estate subject to a life interest to five named nephews and nieces and directed that, if any of them should die in the lifetime of the tenant for life leaving lawful "issue," such issue should take the share which his, her, or their deceased "parent" would have taken if living; but if any of them should die in the lifetime of the tenant for life without leaving "issue" him or her surviving the share of the one so dying should be divided amongst the survivor or survivors and the "issue" of him, her, or them so dying and leaving issue:—

Held, affirming the decision of Younger J. [1916] 1 Ch. 293, that the word "issue" in each branch of the clause must be confined to children.

Sibley v. *Perry* (1802) 7 Ves. 522 applied.

Ross v. *Ross* (1855) 20 Beav. 645, *Ralph* v. *Carrick* (1879) 11 Ch. D. 873, and *In re Embury* (1913) 109 L. T. 511 distinguished. *In re* TIMSON. SMILES *v.* TIMSON - - **C. A. 362**

2. —— *Ambiguity*—*Legacy to* "*Servants*"—*Inapplicability to Farm Labourers.*

Testator gave "to each of my servants who shall have been in my service for three years prior to my decease, and shall be still in my service, one year's wages." At the time of his death testator had land of about 700 acres in Gloucestershire. There was a house on the land in which he employed several domestic servants. He farmed practically the whole of the property himself, and in his farming he employed six labourers at ordinary labourers' wages, who, if servants, complied with the other conditions of the legacy:—

Held, that the labourers were not "servants" within, and did not take under, the legacy.

Semble, that the word "servants," in a legacy to servants simpliciter, ordinarily means persons of the class of domestic servants, though not necessarily employed only in the testator's house, who minister in some way to his personal comfort or wants.

Booth v. *Dean* (1833) 1 My. & K. 560 and *Thrupp* v. *Collett* (No. 2) (1858) 26 Beav. 147 followed. *In re* FORREST. BUBB *v.* NEWCOMB **Sargant J. 386**

WILL—*continued.*

3. —— *Ambiguity*—*Nephews and Nieces and their Children*—*Gift to*—*Inclusion of Children of Illegitimate Sisters.*

By treating or naming definite individuals as relations of the testator when they are not strictly such, and by thereby indicating that he is using a word of relationship in a looser sense than its strict one, a testator may include in a general gift to relations of that class—such as nephews and nieces—not merely the specially named individual, but also other persons who are in a corresponding position.

G. H., the testator, directed the trustees of his will to pay certain legacies to named persons, including 100*l.* to "my sister B. R." (formerly B. H.). The will then directed the trustees to stand possessed of the residue of "my said trust estate upon trust for all or any of my nieces and nephews living at the death of the survivor of myself and my said wife, and the children or child then living of any then deceased nephew or niece of mine who being male attain the age of twenty-one years, or being female attain that age or marry, in equal shares as tenants in common," per stirpes. The will then said: "And I declare that J. R. F. the son of my sister M. W., and W. H. H. the son of my brother John H. shall be entitled to a share equally with my other nephews and nieces."

W. H., the testator's father, had married B. F., the issue of the marriage being Joseph H., John H., G. H. (the testator), and B. H. (the B. R. named in the will). Before the marriage B. F. had had two illegitimate daughters, M. F. (the M. W. named in the will) and S. F. Joseph H., John H., and B. H. all married and had legitimate issue, and John H. had also an illegitimate son, the W. H. H. named in the will. M. F. married, and had no lawful issue but a natural son, the J. R. F. named in the will. S. F. married and died leaving legitimate sons. The testator and his brothers and sisters were all brought up together as one family, and the sons of S. F. were treated by him as his nephews:—

Held, that there was sufficient context in the will to include amongst nieces and nephews the sons of S. F. *In re* HELLIWELL. PICKLES *v.* HELLIWELL - - - - **Sargant J. 580**

4. —— *Class*—"*Nearest of kin of myself*"—*Artificial Future Class*—*Bearing Testator's Surname and being Male.*

Under the testator's will certain devised estates became limited on the death of the surviving tenant for life "to the use of the nearest of kin of myself who shall then be living and who shall be a male bearing the name of Bulcock his heirs and assigns for ever provided nevertheless that such person shall not claim through or under my late brother Ambrose Bulcock."

At the testator's death all of his next of kin according to the statute were disqualified under the terms of the limitation either by sex, name, or descent from Ambrose.

At the death of the surviving tenant for life there were blood relations of the testator alive who were all named Bulcock, being grandsons of paternal uncles of the testator:—

Held, that the testator had created an arti-

WILL—*continued.*

ficial class of kin which was to consist of persons living at the death of the surviving tenant for life, who were related to the testator, were male, bore the name of Bulcock, and were not descendants of Ambrose, and that of the persons so ascertained those who were nearest in blood to the testator were entitled under the limitation. *In re* BULCOCK. INGHAM *v.* INGHAM **Peterson J. 495**

5. —— *Contingency—Bequest to Children when the Youngest attains Thirty—Children dying under Thirty not excluded—Contingency not implied—Remoteness.*

The testator gave his residuary realty and personalty to trustees upon trust to sell and convert and out of the proceeds to pay a weekly sum to his daughter-in-law K. L. until the youngest of her children by his son should attain the age of thirty years, and he directed that after the youngest of his said grandchildren should attain that age the trust funds should be divided between K. L. and her said children in equal shares, and in the event of any one of his said grandchildren dying leaving lawful issue him or her surviving the share of the parent so dying should be divided between his or her children:—

Held, that there was no canon of construction compelling the Court by implication to introduce into the gift to the class the contingency of attaining the age of thirty years, and that, upon the construction of the particular will, the interests of grandchildren who survived the testator were vested and not contingent upon their attaining the age of thirty years.

Held, therefore, that the direction to divide amongst K. L. and her children was not void for remoteness.

Decision of Sargant J. affirmed.

Leeming v. *Sherratt* (1842) 2 Hare, 14, *Parker* v. *Sowerby* (1853) 1 Drew. 488, and *Lloyd* v. *Lloyd* (1856) 3 K. & J. 20 considered and explained.

Dictum of Wigram V.-C. in *Leeming* v. *Sherratt*, 2 Hare, 23, disapproved. *In re* LODWIG. LODWIG *v.* EVANS - - - **C. A. 26**

6. —— *Copyholds—Appointment of Executors—Direction that Debts should be paid—General Devise and Bequest to named Persons—Direction that Everything should be sold without stating by whom—Implied Power to Executors to sell.*

Testator by his will appointed executors and directed that his debts should be paid. He then gave and bequeathed all his real and personal estate, which included certain copyhold hereditaments, to seven named persons, and directed that everything should be sold, without saying by whom, and divided among the seven persons. He also directed that each of his executors should receive the sum of 10*l.* for his trouble. The executors contracted to sell the copyhold hereditaments to a purchaser, but the lord of the manor objected to the proposed conveyance by way of bargain and sale on the ground that they had no power of sale under the will:—

Held, that the executors had a power of sale by virtue of the charge of debts upon the copyholds which resulted from the direction that the debts should be paid.

WILL—*continued.*

Held, also, that the executors were the persons to sell by virtue of the direction that everything should be sold addressed, on construction, to them.

Held, further, that such direction did not in order to be effective either involve or require any estate in the executors, so that on either view they could sell to a purchaser who would be entitled to be admitted direct without the previous admittance of the executors or of any other persons.

Holder v. *Preston* (1769) 2 Wils. 400 and *Reg.* v. *Wilson* (1862) 3 B. & S. 201; 9 Jur. (N.S.) 439, followed.

Patton v. *Randall* (1820) 1 Jac. & W. 189 discussed and distinguished. SISSONS *v.* CHICHESTER-CONSTABLE - - **Younger J. 75**

7. —— *Costs—Transfer—Specific Legacies—Shares—Freehold Mortgage—Assent of Executors—Incidence.*

Where executors assent to specific legacies of shares or mortgages, the costs of transfer, including the executors' own costs in connection therewith, must be borne by the specific legatees.

In re De Sommery [1912] 2 Ch. 622, 628, and *In re Scott* [1915] 1 Ch. 592, 606, applied. *In re* GROSVENOR. GROSVENOR *v.* GROSVENOR **Astbury J. 375**

8. —— *Death Duties—English Domicil—Specific Bequest of Foreign Chattels—Works of Art—Certificate of Exemption from Duties until Sale—Sale of Chattels—Incidence of Duties—Estate Duty—Legacy Duty—"Enjoyment in kind"—Property passing to "Executor as such"—Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 6, 8, 9—*Finance Act,* 1896 (59 *&* 60 *Vict. c.* 28), *s.* 20—*Finance* (1909—10) *Act,* 1910 (10 *Edw.* 7, *c.* 8), *ss.* 63, 96.

By s. 20 of the Act of 1896, as extended and amended by ss. 63 and 96 of the Act of 1910 (except as to persons dying before April 30, 1909), property passing on the death of a deceased person, whether settled or not, and consisting of "objects of national, scientific, historic, or artistic interest," forms an estate by itself and, "while enjoyed in kind," is exempt from estate and legacy and succession duty. But if it is sold the person selling it, or for whose benefit it is sold, is the person accountable for and liable to pay the duty.

A testator, domiciled in England, died in January, 1912, and by his will bequeathed free of legacy duty to S. absolutely a valuable collection of works of art and other chattels at his apartments in Paris. In July, 1912, the executors applied to the Treasury under s. 20 of the Act of 1896 and s. 63 of the Act of 1910 for a certificate of exemption from duties until sale for such of the French chattels as were objects of national, scientific, historic, or artistic interest. On June 2, 1914, the executors assented to the bequest of the French chattels and forthwith delivered them to S., and she immediately on the same day delivered them to a purchaser, to whom she had contracted to sell them in December, 1912. The Treasury certificate specified and declared 80 per cent.

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in value of the chattels to be within the exemption of the sections. On the question whether S. or the residuary personal estate of the testator was liable to pay the English estate and legacy duties in respect of (1.) the chattels comprised in the certificate of exemption, and (2.) the chattels not included in that certificate :—

Held, (1.) affirming the decision of Neville J. on the construction of ss. 20 and 63, that no distinction could be drawn between enjoyment in kind for a moment and for a period of years; that S. had "enjoyed in kind," although only for a most transient period, and was therefore under s. 20 the person liable to account for and to pay the estate duty in respect of the exempted chattels; (2.) reversing the decision of Neville J., that the direction that the chattels were to be free of legacy duty was not limited to duty payable upon the testator's death, but extended to duty payable by S. in the event of the chattels being sold by her; and consequently that the legacy duty was payable out of residue; (3.) by Neville J. (the hearing of the appeal upon this point being adjourned), that the estate and legacy duties in respect of the chattels not within the certificate of exemption were payable out of the residuary personal estate (the gift being free of legacy duty), for that all the personal estate, wheresoever situate, of a testator domiciled in England passes to his "executor as such" within the meaning of s. 9, sub-s. 1, of the Finance Act, 1894, although as to personalty situate abroad he may have to take some proceedings in a foreign tribunal to obtain possession of them.

The principle of *In re Hadley* [1909] 1 Ch. 20 applied.

In re Leconfield [1904) 90 L. T. 399 distinguished.

In re Lord Swaythling (1912) 29 Times L. R. 88 disapproved. *In re* SCOTT. SCOTT *v.* SCOTT . . . . **C. A. 268**

9. —— *Death Duties—Estate Duty—Incidence—Settled Legacy—"Free of all duties"—Annual Sum out of Income of Residue—New Duty imposed after Death of Testator—Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14—*Finance Act,* 1894 (57 *&* 58 *Vict. c.* 30), *s.* 1; *s.* 2, *sub-s.* 1 (*b*); *s.* 7, *sub-s.* 7 (*b*); *s.* 9, *sub-s.* 1.

Testator, by his will made in 1910, bequeathed to trustees the sum of 25,000*l.* upon trust during the life of his wife to pay the income to the person who would for the time being be entitled as tenant for life or tenant in tail to the rents of his settled hereditaments if his wife were then dead, and directed that after the death of his wife the said sum should fall into residue, and that all legacies thereinbefore given or which might be given by any codicil should be handed over or paid free of all duties and deductions in respect of duties (other than income tax) to the several legatees; and the testator thereby devised his settled hereditaments to his trustees upon trusts in favour of his wife during her life, and after her death to the use of his nephew A. for life, with remainder (in the events which happened) to his nephew B. for life, with remainder to the use of B.'s children in strict settlement; and the testator thereby gave his residuary real and personal estate to his trustees upon trust for sale and conversion, and out of the moneys so to arise to pay his funeral and testamentary expenses and legacies, and to make provision for the payment of all duties on any bequests thereinbefore made free from duties or deductions for duties, and to invest the residue upon trust out of the income thereof to pay an annual sum of 3000*l.* to the person who would be so entitled as tenant for life or in tail as aforesaid, and to hold the surplus income upon the trusts therein mentioned.

The testator died in 1913. A. died a bachelor in 1915. Upon the question how as between the beneficiaries under the will the estate duty payable on the death of A. imposed since the testator's death by virtue of the Finance Act, 1914, s. 14, ought to be borne :—

Held, (1.) reversing the decision of Younger J. [1916] 1 Ch. 395, that the duty on the settled legacy must be paid out of the investments representing the 25,000*l.* and not out of the residue; and (2.), varying the order (as drawn up) of Younger J., that, inasmuch as the annuity of 3000*l.* was chargeable upon the whole estate, the residue, the whole of which benefited by the cesser of the annuity, must bear the duty, the annuitant being liable, however, to pay interest on a rateable proportion of the duty corresponding to the proportion which the notional sum required to produce the annuity bore to the whole residue.

In re Parker-Jervis [1898] 2 Ch. 643 applied.

In re Snape [1915] 2 Ch. 179 does not establish any general principle. *In re* PALMER. PALMER *v.* PALMER - - - - - **C. A. 391**

10. —— *Death Duties—Legacies and Annuities—Specific Devise—Trust for Sale and Conversion—Direction to pay "Death Duties," Debts, Legacies, and Annuities out of Proceeds—Settlement of Residue of Proceeds—Annual Sums given thereout—Life Interests therein—Death Duties thereon—Incidence.*

By his will, dated December 9, 1912, a testator who died on June 12, 1914, after giving certain specific and pecuniary legacies and life annuities and making a specific devise, declared (clause 6) that "all the legacies, annuities and bequests" bequeathed by his will should be given and paid free of all "death duties."

By clause 7 he gave his residuary estate on trust for sale and conversion and directed that the trustees should pay his funeral and testamentary expenses, "death duties," debts, legacies, and annuities out of the proceeds, and invest the residue thereof as therein mentioned and hold the same (clause 8) upon trust to pay the "annual sum" of 500*l.* each to A. and B. during the life tenancies of C. and D., and subject thereto upon trust for C. and D. successively for life, with remainder to A. and B. absolutely in equal shares :—

Held, that neither the annual sums given out of the clear residue nor the life interests in that

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clear residue were freed from death duties by clauses 6 or 7.

In re Pimm [1904] 2 Ch. 345, *In re Cayley* [1904] 2 Ch. 781, and *In re Hatch* [1916] W. N. 240 distinguished. *In re* KENNEDY. CORBOULD *v.* KENNEDY - - - - **Astbury J. 379**

11. —— *Death Duties—Settled Legacies—Legacies to " be paid and enjoyed free of all death duties "—Estate Duty—Duty now payable on Death of Tenant for Life of Settled Legacy—Finance Act*, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 14.

A testator who died in 1913 gave six sums varying from 7000*l.* to 1000*l.* to trustees upon trust as to each sum to pay the income to a relation for life, and then to his or her wife or husband for life, and subject thereto he gave the income and capital to the children and issue of the relation. The will also said: " I direct all the legacies (whether settled or otherwise) and the annuities hereinbefore bequeathed to be paid and enjoyed free of all death duties." The real and personal estate was given to the trustees upon trust for sale and conversion and out of the proceeds " to pay my funeral and testamentary expenses and debts and pay or provide for the legacies and annuities hereby or by any codicil bequeathed and the duties thereon " and to invest the residue in trust for certain charities. Sect. 14 of the Finance Act, 1914, abolished the relief which had been given by s. 5, sub-s. 2, of the Finance Act, 1894, in respect of the estate duty which would otherwise have been payable on the deaths of the tenants for life of the settled legacies, and consequently created a further claim for estate duty on those legacies:—

Held, that the words of the will threw that prospective claim on the residue in relief of the settled legacies.

In re Palmer [1916] 2 Ch. 391 followed.

Observations on *In re Snape* [1915] 2 Ch. 179. *In re* STODDART. BIRD *v.* GRAINGER **Sargant J. 444**

12. —— *Devise to A. and " his male heir for ever "—Words of Limitation or Purchase—Estate in Tail Male—Rule in* Shelley's Case.

Testator, by a home-drawn will, made a series of separate devises of various parts of his real estate to A. " and his male heir for ever," the devises being in some instances preceded by life estates to other persons and in others made to him direct:—

Held, that the rule in *Shelley's Case* (1581) 1 Rep. 93b applied, and that A. took an estate in tail male either in possession or remainder according as the particular property was devised to him directly or subject to a life interest. SILCOCKS *v.* SILCOCKS - - **Younger J. 161**

13. —— *Devise—Trusts during Life of Widow—After her Death Devise to A., his Heirs and Assigns—Double Gift over in Events of A. dying without leaving or leaving Issue—Defeasibility restricted to Lifetime of Widow—Fee Simple.*

Testator devised real estate to trustees upon certain trusts during the life of his widow, and after her death devised the same unto his son, " his heirs and assigns," with a double gift over in case he should die either without leaving or leaving issue. The widow predeceased the son:—

Held, that according to the true construction of the will the son became indefeasibly seised in fee simple on the death of the widow.

Gee v. *Manchester Corporation* (1852) 17 Q. B. 737 followed.

O'Mahoney v. *Burdett* (1874) L. R. 7 H. L. 388 distinguished. *In re* BRAILSFORD. HOLMES *v.* CROMPTON & EVANS' UNION BANK **Sargant J. 586**

14. —— *Gift over—If Child should " die without leaving legal issue "—Gift to Tenant for Life—Remainder as to Specific Properties to Testator's Children—Period of Division.*

Testator, who died in 1877, by his will gave his widow an estate for life in all his real and personal property. After her death he divided his property amongst his four children as follows: To his one son he gave a freehold tenement and " 100*l.* in money "; to trustees he gave a mortgage for 1000*l.* on other real estate for the use and benefit of one of his daughters; and to the same trustees he gave other real estate in trust for his two other daughters as tenants in common. Then he declared that " if any of my said daughters or son die without leaving legal issue, her, their, or his share shall be divided equally between the survivor or survivors of him or her or them so dying without leaving legal issue, share and share alike, as tenants in common and not as joint tenants." All the four children survived the widow, and afterwards two of them died leaving issue, and the other two died without leaving issue:—

Held, that the gift over or divesting was only to take effect if a child of the testator died without leaving legal issue in the lifetime of the testator's widow.

O'Mahoney v. *Burdett* (1874) L. R. 7 H. L. 388 distinguished. *In re* ROBERTS. ROBERTS *v.* MORGAN - - - - **Sargant J. 42**

15. —— *Lapse—Provision against Lapse by Death of " Legatee "—Bequest by Codicil—" This my will."*

Testatrix by her will made in 1894 gave a number of specific and pecuniary legacies and disposed of her residuary personal estate, and directed that all bequests and legacies given to married women should be for their separate use, and that " no legacy given by this my will shall lapse by reason of the death of the legatee before me, but shall take effect as if the death of such legatee had happened immediately after my death, and such legacy shall accordingly pass to the legal personal representative of such deceased legatee." The testatrix made seven codicils to her will, each of which contained an express formal clause confirming in other respects her will and any previous codicil or codicils, and died in 1915:—

Held, affirming the decision of Sargant J. [1916] 1 Ch. 523, that the provision in the will against lapse extended to a bequest contained in a codicil of a leasehold house to W. H. H., who predeceased the testatrix; the expression " this

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my will" referring not to the particular instrument, but to the testamentary disposition constituted by the will and codicils at the date of the testatrix's death. *In re* SMITH. PRADA *v.* VANDROY - - - - - C. A. 368

16. —— *Perpetuities—Rule against—Gift of Real Estate to Bachelor for Life—Remainder to any Woman he may marry for Life—Remainder to his Children in Equal Shares—Conversion—Discretionary Power of Sale during Lives of Tenants for Life—Trust for Sale after Death of Son's Wife.*

A devise of real estate in trust for a bachelor or spinster for life, with remainder in trust for any wife or husband he or she may marry for life, with remainder to his or her children, is not void for perpetuity because the class of children to take must be ascertained at the death of the first tenant for life, and the interpolation of a life interest to an unascertained person cannot make any difference. But a trust for sale which does not arise until after the death of the unascertained wife or husband is void for perpetuity and does not effect a conversion. Therefore, if there is no other trust for sale, the children take the real estate as unconverted.

In re Bullock's Will Trusts [1915] 1 Ch. 493 followed.

In re Frost (1889) 43 Ch. D. 246; *Whitting* v. *Whitting* (1908) 53 Sol. J. 100; and *In re Park's Settlement* [1914] 1 Ch. 595, not followed. *In re* GARNHAM. TAYLOR *v.* BAKER
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UL 21 SEP 1970